Naval War College. Navy.

INTERNATIONAL LAW.

LECTURES

DELIVERED AT THE

NAVAL WAR COLLEGE

BY

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PREPARED AND ARRANGED FOR PUBLICATION BY DIRECTION OF THE HON. H. A. HERBERT, SECRETARY OF THE NAVY,

BY

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PREFACE.

By the wish and direction of the Secretary of the Navy, a course of lectures on international law was arranged for by Capt. H. C. Taylor, U. S. N., president of the Naval War College, and delivered at that institution by the late Dr. Freeman Snow, of Harvard University, during the summer course of 1894.

The sad and unexpected death of Dr. Snow before the termination of the course at the War College prevented the preparation of the lectures for publication by his hands as originally intended by the Navy Department.

The manuscript and notes left by Dr. Snow, though incomplete, were considered to be sufficiently valuable to justify publication after due preparation. This has been done by the writer with the assistance of the friends of Dr. Snow at Harvard University. After consultation with them it was also considered wiser, in view of its proposed use, to arrange the volume according to subjects rather than to follow the original divisions by lectures.

To Professor MacVane, of Harvard College, especial acknowledgment is due for his valuable assistance in suggestion and material, the subjects with which he is charged at that institution covering matters common to both constitutional and international law. To Mr. Ernest L. Conant, the successor of Dr. Snow at Harvard, thanks are also due for valuable suggestions and services.

It is believed that anything that adds to the increased dissemination of the rules and usages of international law will strengthen its authority and extend its practice, and thus lead when the occasion arises to the creation of safe precedents by officers of the Navy. Under our Government at present the naval service is the only one combining permanence of tenure with constant dealings in matters of international law in peace and war.

In presenting this volume to my brother officers, I ask that due allowance be made for the difficulties arising from the circumstances of the publication, and I also desire to express to them my deep regret at the loss sustained by the death of Dr. Snow. Had he been spared to himself prepare this work for publication he would have more fully added to those services in his country's behalf which had in the past brought him wounds and distinction.

CHARLES H. STOCKTON,
Commander, United States Navy.

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AUTHORITIES CONSULTED.

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List of authorities consulted and referred to:

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For the leading writers on international law see Wharton's Digest, vol. 1, pp. 13–15; Calvo, 1, pp. 27–32, 45–46, 51–55, 61–63, 70–73, 101–120; Halleck, I, Chap. 1.

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References: Snow's Cases, 385–393; Woolsey, 263–266; Hall, 557–565; Phillimore, 3, 770–784; Heffter, 176, 179–183; Calvo, secs. 3153–3159; Dana's Wheaton, secs. 544–547.

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References: Halleck, 2, 480, 512–522; Snow's Cases, 372–385; Dana's Wheaton, note 169; Heffter, secs. 133, 187-191; Hall, 486, 565–573; Woolsey, 248–252; Phillimore, 3, 616–618; Bluntschli, arts. 545, 727–741; Calvo, secs. 2453–2490, 3150, 3169 et seq.

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References: Snow's Cases, etc., 402–437; Dana's Wheaton, note 215; Halleck, 2, 184–195; Revue Droit Int., vol. 6, 453–532; Hall, 612–620; Walker, 458–502; Phillimore 3, 236 et seq. Revue Droit Intle., Vol. 2, 468.

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References: Halleck, 2, 195; Hall, 80–86, 597–599; Phillimore, 3, 247; Snow's Cases, 459; Bluntschli, art. 768; Walker, 392–394; Wharton's Digest, vol. 3, secs. 390–391.

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References: Snow's Cases, etc., 438–459; Dana's Wheaton, note 15, p. 34; Wharton's Digest, sec. 402, p. 624, etc.; Phillimore, 3, 247–250,

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References: Hall, 644, 658–669, 675–686; Halleck, 2, 244, 251–264, 324; Woolsey, 309–311, 318, 321–329; Dana's Wheaton, secs. 476–500; Maj. G. B. Davis, 340–350; Dahlgren, 65–96; Snow's Cases, etc., 462–490; Abdy's Kent, 334–335; Mosely, p. 9; Glass, 671–672.

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References: Halleck, 2, 215–225; Woolsey, 342–350; Hall, 696–714; Dana's Wheaton, secs. 511–520; Snow's Cases, 490–496; Heffter, secs. 154–156; Kent, 340–350; Dahlgren, p. 85; Blatchford's Prize Cases, 261–262.

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References: Woolsey, 350–351; Halleck, 2, 226–243; Glass, 448–456; Hall, 715; Kent (Abdy), 350, 351; Snow's Cases, 497; Dahlgren, 54–61, 110.

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References: Halleck, 2, 330–339; Snow's Cases, 502–505; Hall, 639–642; Woolsey, 339–342; Phillimore, 3, 370–386; Bluntschli, art. 800; Abdy's Kent, 210.

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References: (*a*) Snow's Cases, 505–509; Woolsey, 355; Hall, 672; Phillimore, 3, 388; (*b*) Lushington, Naval prize law, 14–17; Creasey, 618–625; Tribunals de prises des États-Unis, Bancroft Davis, Phillimore, 3, 391–403; Calvo, secs. 2762–2766; Walker, 514–525; Hall, 673.

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References: (1) Halleck, 267–268, 283–296; Snow's Cases, 515; Hall, 725–731; Phillimore, 3, 522, 544, 550; Woolsey, 358; Calvo, secs. 2939–3003; Dana's Wheaton, secs. 525–528; (2) Woolsey, 365–386; Abdy's Kent, 366–367.

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INTERNATIONAL LAW.

INTRODUCTION.

SECTION 1.—DEFINITION AND SCOPE OF INTERNATIONAL LAW.

International law, as the term is generally understood, is that body of rules which governs the actions of States in their intercourse with one another. These rules are the outgrowth of the customs of nations, of international agreements, and of State acts which have in the lapse of time been accepted as binding by the civilized States of the world. It differs from the municipal or national law of individual States in that it has no superior or supreme tribunal whose function it is to enforce the law in the case of its infraction. Nevertheless, it is obeyed for the most part without question, and it is only on rare occasions that resort is had to war. Indeed, most States have adopted it as a part of their municipal law, and a great majority of the cases that arise under it are adjudicated upon by the courts of law of the individual States.

SECTION 2.—ORIGIN OF INTERNATIONAL LAW.

As a science this law is of comparatively recent origin. There was no international law in our modern sense either in the ancient world or during the chaotic conditions of the Middle Ages. In the earlier ages the Greeks had the Amphictyonic Council, with its limited sphere, to settle certain questions of religion, etc., among their nationalities, while Rome, in the days of her supremacy, was a universal empire, her laws being then universal in their extent.

On the breaking up of the Roman Empire, feudalism gradually took its place in Europe and existed until the Middle Ages. It was not until after the struggle of the Papacy and the Empire, until after the unity of the church had been conceived, and after the time of the crusades, that the great States of Europe emerged from the chaotic feudal system and became firmly established.

The change which took place during the period covered by the fourteenth and fifteenth centuries marked the beginning of the modern era; this was a period of intense activity in every direction. It was distinguished by the revival of learning, the invention of printing, the introduction of the mariner's compass, the use of gunpowder, and by the changes resulting therefrom in warfare.

Upon the ocean great changes took place; the discovery of America and of the passage around the Cape of Good Hope opened a new field of maritime enterprise, which had quick development and important results. Ships were increased in size and differentiated in types, the war marine became distinct from the merchant marine, and the sea which before had been a limit now became a highway.

The increase of commercial intercourse, the multiplication of treaties, the more frequent employment of ambassadors, and the establishment of legations gave favorable conditions for the establishment and growth of the law of nations. The ferocity of the almost constant wars led to a revulsion of feeling in favor of more humane methods in the dealings of nation with nation; until finally the conclusion of the long and devastating thirty years' war by the peace of Westphalia and the appearance of the almost contemporaneous writings of Grotius marked what may be called the starting point of the modern science of international law and of diplomacy. Since that time international law has developed rapidly, and as the intercourse of States has become more and more close by the introduction of steam, the adaptation of electricity, and the extension of commerce, it has become one of the most important branches of public jurisprudence.

PART I.

INTERNATIONAL LAW IN TIME OF PEACE.

CHAPTER I.

SOVEREIGN STATES; TERRITORIAL PROPERTY OF STATES.

SECTION 3.—SOVEREIGN STATES.

Sovereign States are primarily the persons or subjects governed by international law. Cicero defines a State as follows:

> A body politic or society of men united together for the purpose of promoting their mutual safety and advantage by their combined strength.

This definition is not complete without some additions and restrictions. A State must be an organization of people for political ends; it must permanently occupy a fixed territory; it must possess an organized government capable of making and enforcing law within the community; and, finally, to be a sovereign State it must not be subject to any external control. Thus a company of men united for commercial purposes can not be a State in the sense held in international law; neither can a tribe of wandering people nor a community be so considered whose government is permanently incapable of enforcing its own laws or its legal obligations toward other States.

So long as a State possesses the requisite attributes mentioned in the preceding paragraphs international law does not concern itself with the form of its government; it may be an absolute monarchy, a limited monarchy, or a republic; it may be a centralized State or a federal union; or it may change from one to another of these forms at will, without in the least affecting its position in the view of international law.

SECTION 4.—INTERNAL AND EXTERNAL SOVEREIGNTY OF STATES.

The principle that "the persons subject to international law are sovereign States" means that, in order to be fully subject to international law a State must have complete independence in the management of its foreign relations, must have what has been called "external sovereignty." A State may be sovereign in its domestic affairs and yet not be sovereign in the international sense. It may be under the "protection" of some other State, as is the case with the republics of San Marino and Andorra in Europe, with the Transvaal Republic in South Africa, and with most semibarbarous States throughout the world. Again, a State loses its external sovereignty by being perma-

nently linked with another State under a common sovereign, as is the case, for example, with the Kingdom of Norway. Of course also a State that is federally united with any other State or States ceases to be a sovereign State in the sense of international law, no matter how complete its freedom of action may be in its domestic concerns.

It is necessary to the possession of external sovereignty that the State claiming it shall be recognized by other States as free and independent. Until such recognition on the part of other States is universal, a new State claiming external sovereignty can exercise it only toward those States that have recognized its independence.

It is not necessary that the holder of the external sovereignty of a State should also hold the ultimate or political sovereignty. In a popular government such as our own, the ultimate sovereignty resides in the general body of citizens who have the right of voting. But it would be difficult, if not impossible, for the voters to reserve to themselves the exercise of the external sovereignty of the United States. In foreign as well as in home affairs the daily exercise of the national sovereignty is entrusted to the National Government established by the Constitution. The President has the immediate direction of our relations with foreign States. In making treaties his action has to be ratified by two-thirds of the Senate. Declaration of war can be made only with the approval of Congress. Further, in all matters capable of regulation by law the exercise of our external sovereignty may be directed and controlled by acts of Congress. But of course these authorized organs of the national sovereignty are subject, in all they do, to the restrictions of the Constitution. So long, however, as they keep within the lines of the Constitution, they wield, at least in the legal sense, the sovereignty of the United States.

It is perhaps well to mention here the distinctions between a State and a nation. Though the terms are frequently used interchangeably, strictly speaking a nation is composed of people of the same race, whereas a State may be composed of several nations. The Jews are considered to be a nation, while Austria-Hungary as a State is composed of three distinct races: Germanic, Slavic, and Magyar. This distinction has in recent years become of importance from the fact of the movements toward the unity of races, each under one State. Thus we have the Pan-Slavic movement, the Irridentist party in Italy, and various other minor cases.

This tendency toward the union of races under separate States is affecting to a considerable extent the politics of Europe at the present day.

Section 5.—Effect of Internal Changes in a State.

Governments of States are to be regarded only as agents through which the States express their intentions. Though clothed with authority to speak for the State for the time being, these governments may be superseded at pleasure, without the State losing its identity in the family of nations or being affected in its rights or obligations to other States. Chancellor Kent says upon this point:

> It is well to be understood, at a period when alterations in the constitutions of governments and revolutions in States are familiar, that it is a clear position of the law of nations that treaties are not affected, nor positive obligations of any kind with other powers or with creditors weakened, by any such mutations. A State neither loses any of its rights nor is discharged from any of its duties by a change in the form of its civil government. The body politic is still the same, though it may have a different organ of communication.

Hall says:

If in altering its constitution a State were to abrogate its treaties with other countries, those countries, in self-defense, would place a veto upon change and would meddle habitually in its internal politics. Conversely, a State would hesitate to bind itself by contracts intended to operate over periods of some length which might at any moment be rescinded by the accidental results of an act done without reference to them. Even when internal change takes the form of temporary dissolution, so that the State, either from social anarchy or local disruption, is momentarily unable to fulfill its international duties, personal (State) identity remains unaffected; it is only lost when the permanent dissolution of the State is proved by the erection of fresh States, or by the continuance of anarchy so prolonged as to render reconstitution impossible or in a very high degree improbable.

Section 6.—Fundamental Rights and Duties of States.

Certain rights and duties of a primary nature pertain inherently to a State, which may be called fundamental rights and duties. The rights are self-government with absolute and exclusive authority within its own territory, self-preservation, which includes the right to do whatever is essential to its continuance and development, and the right to independence and equality among other States. With these rights may also be classed those of holding and acquiring property, of making treaties, and of declaring war. The right to continue and develop existence gives, according to Hall, to a State the following rights:

(1) To organize itself in such a manner as it may choose.
(2) To do within its dominions whatever acts it may think calculated to render it prosperous and strong.
(3) To occupy unappropriated territory and to incorporate new provinces with the free consent of the inhabitants, provided that the rights of another State over any such province are not violated by its incorporation.

The duties that correspond to the fundamental rights are those of good faith, a readiness to redress wrongs, a proper regard for the dignity and equality of other States, and a general good will toward them.

Section 7.—Classification and Equality of States.

(*a*) *Classification of States.*—States are generally classed under the following heads: Centralized States, Personal union, Real union, Confederate union, and Protected States.

A Centralized State is a single State under one sovereign or central national government. France, Spain, and Portugal are examples.

A Personal union consists of two or more distinct States, otherwise independent, temporarily united under one sovereign. Hanover and Great Britain have been historical examples of this class.

A Real union consists of several originally separate States perpetually united under one sovereign or political organization, though each State may preserve its distinct internal laws. Austria-Hungary is an example of this class of one type, and Great Britain and Ireland of another. A federal union like that of the United States is practically an example of a real union.

A Confederate union is one in which the States forming the union have each retained their independent and individual personality, but have formed into a confederation for purposes of domestic policy and mutual assistance. Of course the external policy of each State is affected by the existence and aims of the confederation. The Germanic confederation, created by the treaty of Vienna in 1815, is an example of this kind.

Protected States are those placed voluntarily or otherwise under the protection of another and stronger State on specified conditions. The effect of the protectorate upon the sovereignty of the State depends upon the conditions of the protectorate. If the protected State retains its capacity to treat, to make peace or war, and to exercise the essential rights of a sovereign State, it does not lose its position as a sovereign State. These rights must be *de facto* as well as *de jure*.

States which are dependent on other States in respect to the exercise of certain rights necessary to a perfect external sovereignty have been called also semi-sovereign States.

(*b*) *Equality of States.*—All States are equal in the eye of international law. This is a fundamental doctrine of international law. In the language of Chief Justice Marshall, Russia and Switzerland have equal rights. This equality is of course only a legal one and does not in practice always shield the weaker State from violence and wrong at the hands of more powerful neighbors. But it is the very object of international law to restrain these unjust and oppressive acts; and it is to its credit that they occur less frequently now than formerly.

There is a class of States not yet referred to which has been recently admitted into the society of international law and which can hardly lay claim to all the rights of sovereign States. These are the semi-barbarous States of the East. Such are Turkey, Persia, China, Morocco, and other smaller States. The civilized States of Europe and America, have entered into treaty relations with these States and have established generally diplomatic relations with them, yet they are not permitted to exercise jurisdiction over the subjects and citizens of European and American States residing or traveling within their limits. Foreign consuls exercise a jurisdiction in their territories which thus derogates from their sovereignty. This arrangement is, however, regulated wholly by treaty. Japan is now considered capable of fulfilling her obligations to other States and this restriction is in her case being removed by treaty by the civilized powers.

The condition of chronic civil commotion existing in many of the Spanish American States has raised the question whether they should be treated in all respects as sovereign independent States. Indeed, in several respects rules of international law peculiar to them and their conditions have been adopted which will be given hereafter.

In palliation of their condition it might be said that when they began their existence as independent States seventy years ago their people had never had the slightest experience in self-government. They were ruled by governors appointed by the King of Spain, and they had existed largely, if not solely, for the benefit of the mother country. Their commerce was restricted to Spain and the carrying trade to Spanish ships. The different provinces were not permitted even to trade with each other, and products of the soil were confined to those articles that would not compete with those of Spain, while education was restricted and all local affairs directed by the central authority. Upon gaining their freedom they took the Constitution of the United States as a model and, though entirely unfamiliar with its practice and spirit, attempted to govern by its methods. Notwithstanding the general want of success in their first attempts at self-government, it must be admitted that such States as Mexico, Chile, Colombia, Venezuela, and Argentina have made substantial progress. Less can be said for the progress of the other countries of South and especially Central America. The mixture of races adds greatly to the difficulty of forming stable governments in those regions.

SECTION 8.—RECOGNITION OF NEW STATES.

Pomeroy gives three cases in which nations are called upon to recognize a state of facts in other countries different from that which existed before. They are:

(1) When the existing personal ruler of a State already enjoying an independent position assumes some new title and calls upon other States and Governments to recognize that title as belonging to him.
(2) When an existing nation has acquired new territory as the result of conquest and claims to have it recognized as a part of her national domains.
(3) When a portion of an existing nation separates from the remainder and claims to be recognized as a new, independent, sovereign, and coequal member of the family of nations—a new body politic and State.

We will here concern ourselves only with the third case.

For the most part new States come into existence through successful rebellion. This has been the case with all existing American States and with many of the European States. When a rebellious community has practically attained its end, which is independence, and the mother country has ceased military operations against it, then, if the government and institutions of the new State appear regular and stable, it is recognized by third States as an independent State and a member of the society of nations. This is usually done either by entering into diplomatic relations with the new State or by negotiating treaties with it. The United States were recognized in 1778 by France by treaty, while the South American States were recognized by the United States in 1822 by a resolution of Congress to send diplomatic agents, and by England by making treaties. As a rule the mother country does not recognize the new State until a later time.

The rule of international law with reference to the recognition of the independence of a State is that war for its subjugation has practically ceased and that it has a stable government. The commencement of a State as a subject of international law dates from this recognition of independence by existing States. Concerning this Hall says:

Although the right to be treated as a State is independent of recognition, recognition is the necessary evidence that the right has been acquired.

Effects of the recognition by the parent State and by third States.—Though, as a matter of equity and international law, the recognition by a parent State of the independence of a rebellious community is of no more value than that of third States, as a matter of fact it is of much greater value as conclusive evidence that the independence of this community is completed without further question.

Cases have occurred where third States have recognized the independence of a rebellious community prematurely; such recognition has been generally followed by a declaration of war by the parent State upon the ground that such action places the third State in the position of an ally to the rebellious community, and hence of an enemy to the parent State. The case of France and the United States in 1778 was one in point. John Quincy Adams gives a safe rule when he says:

The justice of a cause, however it may enlist individual feelings in its favor, is not sufficient to justify third parties in siding with it. The fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty.

SECTION 9.—EFFECT OF A CHANGE OF SOVEREIGNTY.

(*a*) *Upon public rights and obligations.*—It is generally conceded that when a new State is formed by a separation from one already existing,

the rights which have been acquired and the obligations which have been contracted by the parent State adhere only to that State. This obtains in a general sense as a rule of international law. There are, however, modifications of this rule. One is that by special agreement obligations can be assumed in part, proportionately or otherwise. Another modification of the rule applies to local rights and obligations of the ceded territory, boundary lines, and the rights of navigation in rivers running through other countries besides its own. Certain local obligations may also be inherited, such as regulation of channels, levying of dues, payment of local debts or debts guaranteed by local reveenues. Property formerly owned by the parent State, whether in the form of land, buildings, collections of artistic or scientific objects, endowments, etc., lying within the boundaries of the new State, should belong to the latter State. In the matter of conquest or cession of territory the question of partition or nonpartition of the obligations of the parent State is a matter regulated by treaty or convention.

(*b*) *Upon private rights and obligations.*—It has been generally held, and especially by those whose acts create what may be looked upon as the continuous foreign policy of the United States, that rights and obligations of individuals are not affected by a cession or conquest of territory. They do not deny, of course, the right of a conqueror or new State to confiscate for political offenses, or to withdraw franchises which by the principles of international law can be withdrawn by existing governments; but they do not allow vacation of titles upon the ground that the law of the new State would not have granted such titles in the first instance.

Chief Justice Marshall puts the case in these words:

> It may not be unworthy of remark that it is very unusual even in cases of conquest for the conqueror to do more than displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed.

SECTION 10.—DE FACTO GOVERNMENTS.

Definition of de facto governments.—A *de facto* government or belligerent community is a political organization that has established itself, by regular hostilities or otherwise, to such a degree that it can exercise sovereign powers and be entitled to all of the rights of war and commercial intercourse. As a government *de facto* and not *de jure* it has not all the rights of a sovereign and independent State. The recognition of a *de facto* government, as such, may be consistent with uncertainty as to its permanence. Without permanence, however, one of the essential attributes of a sovereign State is wanting.

(*a*) *Recognition of belligerency.*—There are usually two prior stages through which a new community passes before arriving at independence; one is insurgency, the other belligerency. The same questions of international law arise in the case of all rebellions, whether it be the case of a colony or province attempting to secure its independence or whether it be the attempt of a party in a State to overthrow the existing government in order to take its place as ruling authority. In these cases the insurgent community may never get beyond the first stage, as in the Brazilian insurrection of 1894. It may reach the second stage—belligerency—and get no farther, as with the Confederate States in our

civil war of 1861–1865, or it may gain its end as insurgents, never having been recognized as belligerents, as in the case of the Chilean insurgents in 1891.

There is at present a great deal of discussion as to the position of insurgents. Hitherto certainly they have had no standing in international law. In all of the older treatises on international law and in decisions of courts they have been referred to as pirates if they were found on the high seas.

Recent practice would seem to be opposed to this view, but the discussion of this special phase of the question will be deferred until the subject of piracy is considered.

As to the position of insurgents in general it is agreed that they have no belligerent rights. Their war vessels are not received in foreign ports, they can not establish blockades which third powers will respect, and they must not interfere directly with the commerce of third States. Indeed, the hostilities which take place between the legal governments and rebels is, strictly speaking, not war, and there are present none of the legal consequences which war brings. For instance, there are no neutrals.

In two important rebellions of recent years in South America, that of Chile in 1891 and that of Brazil in 1894, a peculiar state of affairs existed. There was no recognition of belligerency in either case, and yet the rebels were given freedom of action by the third powers. Very often a state of affairs similar to this arises from the presence of international politics in such cases as distinguished from purely international law.

A question arose during the operations in Rio harbor which was virtually a new one. It was whether the insurgents in the course of regular hostilities, as a bombardment of the city or an attack upon the Government forts, could practically prevent foreign merchantmen from moving about the harbor and from discharging and receiving cargoes at the regular places. This was outside of the question of the right of a declaration of a blockade by the insurgents.

The decision of Admiral Benham, in command of the United States naval force, was to the effect that this could be done by the insurgents and that any movement on the part of American merchant vessels during the continuance of actual hostile operations was at their own risk. But any attempt on the part of the insurgents to prevent legitimate movements of our merchant vessels at other times was not to be permitted and that all possible protection was to be afforded such movements by the naval force of the United States assembled at Rio under his command. The establishment of this point, which seemed to be the logical outcome of recent practice, almost recognizes an imperfect status, or right of action afloat, for insurgents.

The next stage beyond insurgency is that of belligerency. A community that has arrived at this point is generally known as a belligerent community and has attained the status of a *de facto* government. It has not, as previously stated, the rights of a sovereign and independent State.

The conditions necessary to belligerency are not so much principles as facts, while the grounds for the recognition of belligerency, or of belligerent communities as such, by third States are based upon possibilities or probabilities that the interests of the third States may be so affected by the existence of hostilities as to make a recognition of belligerency a necessary or convenient measure. If hostilities extend to the sea, or to its borders, such recognition becomes more pressing, as

neutral powers have in time of maritime war to concede to belligerents certain rights which affect the freedom of action of their own citizens or subjects.

Dana says in his note to Wheaton:

> In such a state of things the liability to political complications and the questions of right and duty to be decided at once, usually away from home, by private citizens or naval officers seem to require an authoritative and general decision as to the status of the three powers involved. If the contest is a war, all foreign citizens and officers, whether executive or judicial, are to follow one line of conduct; if it is not a war, they are to follow a totally different line.

When a State recognizes an insurgent community as having attained the state of belligerency, the recognition is generally made by a formal notification of neutrality, giving the date from which the State assumes the attitude of neutrality in the contest.

As to a parent State, the matter is in a different light. The parent State can not be expected to proclaim recognition of an insurgent community as a belligerent. It acts naturally in an indirect manner and its relations toward the insurgents or rebels must be judged by these acts. A proclamation or establishment of blockade, an exchange of prisoners, and the enforcement of the rules of war as to the carriage of contraband by neutrals, etc., can be considered as manifest though indirect acts of recognition of belligerency by the parent State or regular government.

(*b*) *Relations of a belligerent community, become independent, to the contract rights and duties of the parent State.*—Independence can not be considered as having been established by a belligerent community so long as a substantial contest is being maintained by the parent State or former government for the recovery of its authority. But this contest must be on a sufficient scale and so promising as to present reasonable grounds for ultimate success. A mere pretension of war or hostility will not keep alive the rights of the parent State and prevent the recognition of the new State by other States. This was shown in the case of Spain and her American colonies in the latter days of their struggle for independence.

When a belligerent community finally becomes independent, the relations toward the contract rights and duties of the parent State as to treaty obligations, property, and debts are the same as when a change of sovereignty occurs in a portion of territory of an old State by cession or conquest. This is discussed in the preceding section.

Upon the failure of a belligerent community to establish itself or maintain hostilities against the parent State, all of the rights and property acquired by that community become immediately vested, upon its suppression, in the parent State.

Section 11.—Territorial Property of a State.

The territorial property of a State, as the term is used in international law, consists of all the land and water over which the State has jurisdiction or control, whether the legal title be in the State itself or in private individuals.

(*a*) *Nature of the territorial title of a State.*—The nature of the territorial title of a State in land owned by individuals or corporations is absolute, so far as it excludes other nations, but with respect to the subjects or citizens of its own State it is considered paramount only, and forms what is called the right of eminent domain; that is, as Wheaton puts it, the right, in case of necessity or for the public safety, of disposing of all property of every kind within the limits of the State.

A State, like a private corporation, is in law also a legal person and in its corporate capacity may have absolute ownership of property just as an individual in the State has ownership in his property. Thus arsenals, navy-yards, public lands, etc., are owned by the State and in some cases railways, telegraphs, and canals are also so owned.

This species of property so long as it is within the boundaries of the State plays no part in international law, but when found in a foreign State it is not subject to the jurisdiction of the owning State, excepting that kind of property which enjoys certain immunity known as exterritoriality. Ships of war and the hotels of ambassadors are instances of this kind. Indeed, other kinds of property of the State, such as munitions of war, etc., if found within foreign territory have been held to be free from the ordinary process of law.

There is no difficulty as to specifying the property of the State on the land, when the boundaries are once fixed, but the rights of the State over waters are not so well defined.

Lakes and rivers wholly within a State are, however, unquestionably part of the territorial property of that State. But with respect to bays and gulfs there is yet dispute; in other words, the historical development of the subject is not yet complete. As to marginal seas, a State can claim the narrow belt of water now universally conceded as territorial property, as a matter of necessity for the better security of its people on land and also for the enjoyment of its fisheries. This is a proper appropriation, because this marginal portion of the sea can be effectually commanded from the shore by modern artillery.

Section 12.—Extent of the Territorial Waters of a State.

At the time when international law began its existence as a science in the sixteenth century a large portion of the sea was claimed as *mare clausum*. This included a large part of the Atlantic, all of the seas about England, and also the Adriatic and Baltic seas. Grotius published his treatise entitled *Mare liberum* in 1609, and a few years later Selden answered, advocating the right of England over the seas washing her shores; but from that period the interests of commerce demanded the freedom of the seas and gradually the exclusive claims were given up, until in the beginning of the nineteenth century the excessive pretensions of former times were reduced almost entirely to the 3-mile limit and to certain bays and gulfs of varying width and length.

In the long controversy over the right of the fisheries that was carried on between the United States and Great Britain it was attempted to exclude our fishermen from the Bay of Fundy, the bight of Prince Edward Island, Cow Bay, and other bodies of water of the maritime provinces of Canada. These claims have all been yielded by England, but she still claims the bays of Chaleur, Fortune, Conception, and other bays of Newfoundland as closed seas. The United States would probably take the same view in respect to the Delaware, Chesapeake, and similar waters on our own coast, and very recently somewhat similar views were put forth with reference to Bering Sea. This latter claim was so far modified before the tribunal of arbitrators at Paris as to relinquish the claim to that sea as *mare clausum*. The contention that the United States had the right to protect the seals in the open sea against the encroachment of subjects of other States was decided against the United States by the Paris tribunal.

The rule of the 3-mile limit was based originally on the range of cannon; it has now become an arbitrary distance in all probability too well established to be changed with the increasing range of cannon. Owing to this increased range of great guns restriction against target practice has been extended in the United States Navy to points outside of this belt from which shots may fall within foreign territory.

Great Britain, from the position she once held of advocating exclusive claims over the seas that washed her shores, has become one of the foremost of the advocates of the 3-mile limit of jurisdiction upon the high seas. This position was considered as unshaken until the case of the *Franconia* arose in 1877.

The *Franconia*, a German merchant vessel, while bound from Germany to the West Indies, ran down an English merchant steamer off Dover and within the 3-mile limit, causing loss of life and with circumstances which, under English law, amounted to manslaughter. The master of the German steamer was convicted of manslaughter, but an appeal was made upon the point of law that English courts had no jurisdiction over criminal offenses committed on board foreign vessels passing within 3 miles of the English shore. By a close majority the judges upheld this objection, after acknowledging the international rights over the 3-mile limit held by Great Britain; but in absence of express municipal legislation they declined to enforce the doctrine that the law of nations was adopted in its full extent by the common law and was in fact a part of the law of the land.

In consequence of this decision an act was passed by the English Parliament in the session of 1878, which adopted the views of the minority of the court, declaring that the rightful jurisdiction of the Queen extends, and has always extended, over the open seas adjacent to the coast of the United Kingdom and of all other parts of Her Majesty's dominions, to such a distance as is necessary for the defense and security of such dominions, and that it was expedient that all offenses committed on the open sea within a certain distance of the coasts of the United Kingdom and of all other parts of Her Majesty's dominions, by whomsoever committed, should be dealt with according to law. In the same act the certain distance referred to was defined as one marine league measured from the low-water mark. It was further directed in the act that no proceedings were to be instituted against a foreigner without the consent and certificate of a secretary of state, or, in the case of a colony, the certificate of the governor. Walker says, in commenting upon this act of Parliament:

> Thus was reestablished in England the authority of international law on the footing on which the rest of the world had placed it.

In regard to the use of the marginal waters of a State or of straits exclusively under the territorial jurisdiction of a State, but connecting free and unappropriated waters for purposes of navigation or "innocent passage," there seems to be no dispute. No European territorial waters of this description have been closed to commercial navigation for more than two hundred and fifty years, and during the nineteenth century no such waters have been closed in any part of the civilized world; hence the right may be considered to be completely established. Hall says:

> But this right of innocent passage does not extend to vessels of war. Its possession by them could not be explained upon the grounds by which commercial passage is justified. The interests of the whole world are concerned in the possession of the utmost liberty of navigation for the purposes of trade by the vessels of all States. But no general interests are necessarily or commonly involved in the pos-

session by a State of a right to navigate the waters of other States with its ships of war. Such a privilege is to the advantage only of the individual State; it may often be injurious to third States; and it may sometimes be dangerous to the proprietor of the waters used. A State has therefore always the right to refuse access to its territorial waters to the armed vessels of other States if it wishes to do so.

What has just been quoted would bear closely upon the status of any interoceanic canal built and used mainly for commercial purposes.

Besides the rights over its own territory a State sometimes acquires, by treaty or prescription, rights in the territory of other States, such as the right to navigate rivers and the right of fishery. With respect to both of these questions we have had long-continued and serious disputes with Great Britain. The first question arose with respect to the right to navigate the St. Lawrence River. The claim made by the United States was that this right rested upon the grounds of natural right and obvious necessity. On the part of the British Government it was denied that a perfect right to the free navigation of the St. Lawrence existed in accordance with the principles and practice of the law of nations. This controversy was ended by the reciprocity treaty of 1854, under which the citizens and inhabitants of the United States were permitted to navigate the river St. Lawrence and the Canadian canals between the Great Lakes and the Atlantic Ocean, and British subjects were granted the right to navigate Lake Michigan. This treaty was abrogated in 1866, but the matter was revived; and under the treaty of Washington, of May 8, 1871, it was provided that the navigation of the St. Lawrence from the point where it ceased to form the boundary between the two countries to and from the sea shall forever remain free and open for the purposes of commerce to the citizens of the United States, subject to any laws and regulations of Great Britain or of the Dominion of Canada not inconsistent with such privilege of free navigation. The same freedom to the navigation of the Yukon, Porcupine, and Stikine rivers was granted to both citizens of the United States and British subjects, and also for a limited term of years the freedom on the part of British subjects to the navigation of Lake Michigan. We need not now go into the question of the inconsistency of Great Britain in this matter—so well described by a British authority, Phillimore, in his work upon international law—nor need we review the claim made by the Government of the United States that the St. Lawrence stood in the same position as a strait. The statement made by Pomeroy, sustained, as it is practically, by Wheaton and others, covers the ground most fairly. It is:

The rule, which may now be deemed settled by the practice of nations, is that the people residing upon the upper waters of a river have no international right to navigate the same through the territories of another State; that it requires the special agreements of a treaty between the two governments to create, establish, and regulate such a right. Treaties containing stipulations of this nature have been made, and most of the great rivers of Europe are within the operation of such conventions.

The river La Plata, with its branches, the Parana and the Uruguay, was opened to general commerce during the period from 1851 to 1859, and the Amazon at a later date. By the act of the Conference of Berlin, in 1885, the principles of free navigation were extended to the Kongo and Niger rivers, in Africa.

In regard to bays, gulfs, and straits which are more than six miles wide many cases of serious controversy have arisen in which territorial jurisdiction has been claimed and disputed.

A supremacy claimed by the King of Denmark over the waters of the sound and two belts which form the outlet of the Baltic into the

ocean was made a basis for the collection of duties or dues from vessels using these passages—duties which became famous in diplomatic and international law as "the sound dues." These dues became so great a burden to commerce that active opposition finally arose both in Europe and America, and the right of Denmark to collect them was warmly disputed, especially in the United States. Denmark therefore, in 1855, suggested a project of capitalizing the sound dues, and in accordance with this suggestion a European congress met at Copenhagen and concluded a treaty by which, in consideration of the payment of a lump sum, these duties were to be forever abolished as regards ships of the nations joining in the treaty.

The United States declined to become a party to the treaty on the ground that Denmark did not offer to submit to the convention the question of her right to levy the sound dues and also that the proposition contemplated a political result—"the balance of power among the governments of Europe." The United States, however, concluded a separate treaty with Denmark in 1857 by which a sum of money was paid to Denmark in consideration of her agreement to keep up lights, buoys, and pilot establishments, thus avoiding the recognition of the right of Denmark to collect the dues.

The navigation of the Bosphorus and the Dardanelles has been of late years another subject of dispute and treaty. The Ottoman Porte claimed the right to exclude other nations from navigating these passages which connect the Mediterranean and Black seas. This contention seemed well founded when all of the shores of the Black Sea were under the jurisdiction of Turkey, but since the acquisitions on that sea by Russia the claim is not a reasonable one. The right of free navigation for merchant vessels was recognized in 1829, but the right to prohibit foreign vessels of war from navigating these Turkish waters has been recognized by the European powers by treaty and otherwise.

By the treaty of Paris in 1856, as modified by the treaty of London in 1871, the Black Sea was thrown open to merchant vessels of all nations, but the straits mentioned are closed to ships of war except that the Sultan has the faculty of opening them in time of peace to the vessels of war of friendly and allied powers in case he deems it necessary for carrying out the stipulations of the treaty of Paris. The United States have never adhered to either of these treaties and have always maintained that their right to send ships of war into the Black Sea can not be legally taken from them by any arrangement concluded by European powers to which they are not parties. No attempt, however, has ever been made by the United States to insist upon such passage. American ships of war have, while reserving all questions of right, always asked permission of the Porte to pass the Dardanelles.

Bristol Channel has been held by English courts as an inclosed water under English jurisdiction, and Conception Bay, in Newfoundland, which is something over 15 miles wide at its mouth, has been held by the privy council to be a British bay; while in 1793 the Attorney-General of the United States held that Delaware Bay formed a part of the territorial waters of the United States. Hall says:

> On the whole question it is scarcely possible to say anything more definite than that, while on the one hand it may be doubted whether any State would now seriously assert a right of property over broad straits or gulfs of considerable size and wide entrance, there is on the other hand nothing in the conditions of valid maritime occupation to prevent the establishment of a claim either to basins of considerable area, if approached by narrow entrances such as those of the Zuyder Zee, or to large gulfs which, in proportion to the width of their mouth, run deeply into the land, even when so large as Delaware Bay, or still more to small bays, such as that of Cancale.

Ports and roadsteads are of course under the sole jurisdiction of the State which possesses the coasts upon which they are situated. This property and jurisdiction, which does not interfere with the rights of other States to a free passage and use of the seas, is incontestable in international law. This territorial ownership carries with it on the part of the State that possesses it the right to declare these ports and roadsteads closed, open, or free, and the right to require without restriction and without regard to other nations that ships and merchandise arriving at the ports be subject to such customs and other regulations as it may deem proper. It is necessary, however, that the use of the ports and its regulation should be general in their character and without discrimination in favor of or against any nation; this is made obligatory by usage and international law in accordance with the right of equality possessed by all foreign States. A nation that should deny its ports to one nation without just reason while allowing its use by another would be wanting in its international duty and justly expose itself to complaints that would eventually bring on measures of retorsion. In principle, then, a port open to commerce is, as Calvo says, tacitly considered as accessible to ships of all other nations, and unless otherwise stipulated by treaty the free entrance permitted to merchant ships extends to vessels of war of friendly States. There are, of course, special circumstances which justify a State in refusing vessels of war of other States admission to its ports.

The admission of vessels of war to certain ports or anchorages is not only at times influenced by political considerations or certain international requirements which vary according to the time and place, but the question of anchorage is at times controlled by reasons of public order and security. Parts of harbors may be reserved for commercial or national purposes, for torpedoes or other means of local defense, and the port regulations may also forbid certain anchorages to vessels of war on account of danger from explosives carried by them.

CHAPTER II.

TERRITORIAL JURISDICTION OF A STATE.

SECTION 13.—GENERAL RULE OF TERRITORIAL JURISDICTION.

One of the fundamental rules of international law is that an independent State has absolute and exclusive jurisdiction over all persons and property within its boundaries. That there are some important exceptions to this rule does not disprove the rule itself, and beyond these few well-defined exceptions it is universally admitted and enforced, and upon the whole there is perhaps no more important practical rule of the law of nations. At the present time when, from motives of business or pleasure, citizens and subjects of the several States are at all times residing in or passing through States other than their own, there is almost constant occasion for the application of this rule. Citizens of one State going into the territory of another State subject themselves and their property to the jurisdiction of the latter in all respects as if they were its own citizens.

This rule being plain and simple, it needs only to be stated; the exceptions however require more extended discussion. The first exceptions are those known as immunities, or exterritoriality.

SECTION 14.—IMMUNITIES OF SOVEREIGNS.

Chief Justice Marshall says:

All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source. * * * The world being composed of distinct sovereignties possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

And further:

One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license or in the confidence that the immunities belonging to his independent sovereign station will be extended to him.

This perfect equality and absolute independence of sovereigns and this common interest impelling them to mutual intercourse * * * have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.

These cases are: (*a*) The exemption of the person of the sovereign from arrest or detention within a foreign territory; (*b*) the extension of the same immunities to ambassadors and all diplomatic agents.

SECTION 15.—IMMUNITIES OF DIPLOMATIC AGENTS.

In the case of ambassadors the theory formerly held was that they represented the sovereign personally, and immunities were accorded them for the same reasons as in the case of sovereigns themselves. But this theory did not hold in respect to diplomatic agents of lower rank, and when republics began to come into existence in the modern era the agent represented the State and not the personal sovereign. To account for their immunities the lawyers invented the fiction of exterritoriality, that is, that the diplomatic agent carries with him a portion of his own country and thus constructively is still under the jurisdiction of his own State.

The law of nations, however, is now so well established upon this point that it needs no fiction to support it, and it is the tendency with recent writers to explain the position of diplomatic agents on grounds of expediency; freedom from local jurisdiction being necessary for the full and efficient performance of their duties. No doubt, too, tradition and custom give additional weight to the rule.

As to the extent of the immunities of diplomatic agents, the general law is settled by a long series of adjudicated cases that they are not subject to either the criminal or civil jurisdiction of the place of their residence. The only crime for which an ambassador may be arrested and detained, if necessary, is that of conspiracy against the safety of the State, and then he is to be sent out of the State.

A diplomatic agent can not be forced to give evidence in a court as a witness, though sometimes, as in the case of the trial of Guiteau, this right is waived, by the consent of his government, as an act of courtesy and justice.

A diplomatic agent who engages in trade in the country to which he is accredited does not thereby forfeit the privileges and immunities accorded to diplomatic agents, but when he voluntarily appears in compliance with a writ and submits himself to the jurisdiction of a court, the court is not bound to interfere for his relief on account of his official position.

The immunities of ambassadors and diplomatic agents are extended to their immediate families and their official suite.

The expression "ambassadors and other public ministers" in the Constitution of the United States is construed as comprehending all officials having diplomatic functions, whatever their title or designation.

Consuls are not diplomatic agents. The laws of the United States forbid the exercise of diplomatic functions by consuls unless expressly authorized to do so by the President of the United States.[1]

SECTION 16.—IMMUNITIES OF SHIPS OF WAR AND ARMED FORCES.

The organized armed forces of a State, representing its sovereign power, are never subjected to the jurisdiction of another State if they are temporarily within its territory. An army is never allowed to cross the boundary of a friendly State without the express permission of that State.

The march of an army through a district, even with all possible precautions against injuries to private citizens and their property, is a grave matter. Since railroads have come into use, however, the objections on that score would not be so great, since an army may be trans-

[1] See U. S. Rev. Stat., sec. 1738.

ported by rail through a friendly country with little or no danger to the inhabitants. But it is extremely rare for an army to enter the territory of a foreign State without hostile purpose.

As to ships of war, the case is different. Their mere presence in a foreign friendly port occasions no damage or inconvenience. Therefore, not only is no license required, but if there be no express prohibition, the ports of every nation are considered as open to the public ships of war of all powers with whom it is at peace, and such ships in friendly ports enjoy to the fullest extent the right of exterritoriality. Their immunity from local jurisdiction has come to be more absolute than that of the official residence of ambassadors, and probably for the reason that they have the efficient means of resistance which an ambassador has not.

In a note to Wheaton, Dana says:

> It may be considered as established law, now, that the public vessels of a sovereign State coming within the jurisdiction of a friendly nation are exempt from all forms of process in private suits. Nor will such ships be seized or in any manner interfered with by judicial proceedings in the name and by the authority of the State, to punish violations of the public laws. In such cases the offended State will appeal directly to the other sovereign. Any proceedings against a foreign public ship would be regarded as an unfriendly, if not hostile, act in the present state of the law of nations.

The rules as to ships apply to all tenders, boats, or other flotilla belonging to vessels of war and detached therefrom upon any service.

The tribunal of arbitrators at Geneva held that the principle of exterritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations. Hence, as Hall says, the crew and other persons on board of a vessel of war in foreign waters can not ignore altogether the laws of the country in which she is lying as if she constituted a territorial enclave or close. Acts beginning and ending on board of the ship and taking no effect externally to her are not subject to the territorial jurisdiction of the port. In relation, however, to matters external to the ship the exemption from the local jurisdiction is not so complete. A vessel of war must not appear as a disturbing agency in the ports of a friendly State, nor allow herself to be used as a center of disturbance by others. She must conform to the rules of the port relating to quarantine, anchorages, etc., unless there be a special usage to the contrary. On the other hand, she is exempt from visitation and search by the customs officials of the port. By the regulations of the United States Navy, commanding officers are strictly forbidden to allow examination of their ships by foreign customs officers.

As a rule, when persons belonging to a vessel fail to respect the laws of the country when on board of their vessel, the offended State, as Mr. Dana says, must appeal for redress to the other Government through the proper diplomatic officials.

It must not be understood, however, that this doctrine of the immunity of a ship of war goes so far as to deprive a State of all power over the acts of a public foreign ship. Entrance into the harbors of the State may be denied to any ship refusing to respect the local laws; her stay may be limited; she may be ordered to depart, and if necessary force may be used to expel her, as in the case of an ambassador. Such expulsion is provided for by statute law in section 5288 of the Revised Statutes of the United States, in which the President is empowered to use for this purpose the land and naval forces of the United States or the militia thereof.

When a vessel of war is in a foreign port her commanding officer retains his full authority to maintain order and punish offenses committed on board. But in the case of crime committed on board by persons not belonging to the ship's company, it is generally conceded that the commanding officer may with propriety hand over the parties to the authorities of the port. If both the offender and the injured are citizens of the State owning the port, it would seem to be his duty in ordinary cases to hand over the criminal. The same principle applies to ordinary criminals seeking to escape the punishment of their crimes by taking refuge on board vessels of war. It is wrong to harbor them; the privilege of refuge is only for persons who are pursued for political offenses. But the surrender is, in all cases, at the discretion of the commanding officer. The accused person can not be taken out of the ship without his order. The sovereign of the port has no right of seizure or arrest on board of foreign vessels of war in any case whatever. Delivery of the offender may be requested, but in case of refusal further proceedings looking toward the surrender must be by way of diplomatic representations to the State whose vessel of war is concerned.

Hall says:

> The immunities of a vessel of war belong to her as a complete instrument, made up of vessel and crew, and intended to be used by the State for specific purposes; the elements of which she is composed are not capable of separate use for those purposes; they consequently are not exempted from local jurisdiction.

Pomeroy, an American jurist, says:

> If a ship of war is abandoned by her crew, for example, she becomes merely property, but if any officer or member of the crew while on the land should make himself culpable by an infraction of the laws of the country there is no doubt whatever that the local authorities have jurisdiction over such persons while they remain on shore and may cause them to be arrested before they quit the land, and to be punished according to their own laws. But the commanders of the vessels should be immediately informed of the arrest and the causes which led to it, in order that either they or the diplomatic agents of their Government may make all necessary endeavors either to procure that the persons accused should be returned to them, or to watch the manner in which they are treated and tried.

If the offender, however, escapes to his vessel, he can not be pursued or apprehended there.

Proceedings for salvage can not be taken against a foreign public vessel. In January, 1879, the United States frigate *Constitution*, laden with goods which were being taken back to the United States at the public expense from the Paris Exposition, went aground upon the English coast. Assistance was tendered by a tug; and a disagreement having taken place between its owner and the agents of the United States Government as to the amount of the remuneration to which the former was entitled, application was made for a warrant to issue for the arrest of the *Constitution* and her cargo. The United States Government objected to the exercise of jurisdiction by the court; the objection was supported by the counsel on behalf of the English Government; and the application was refused by the judge, Sir R. Phillimore, on the ground that the vessel being a war frigate of the United States Navy, and having on board a cargo for national purposes, was not amenable to the civil jurisdiction of that country.

Hall says:

> Besides public vessels of the State, properly so called, other vessels employed in the public service and property possessed by the State within foreign jurisdiction are exempted from the operation of real sovereignty to the extent, but to the extent only, that is required for the service of the State owning such vessels or property.

The ship herself is exempt from the legal process, but persons on board such vessels are subject to the local jurisdiction for offenses against the peace of the port.

During time of war the ordinary privileges of a port may without discourtesy be by military necessity restricted or suspended. Several cases have occurred in connection with vessels of the United States in years past that illustrate violations of the local jurisdiction of ports and territory of foreign States. In 1866 and 1867, at the Brazilian ports of Rio de Janeiro, Pernambuco, and Maranham, attempts were made to capture deserters on shore in violation of the territorial jurisdiction.

In Maranham an officer from a man-of-war discharged the contents of a revolver in the streets of the city while in pursuit of a deserter from his boat. For this breach of the peace he was arrested, whereupon his commanding officer claimed redress for this ordinary and proper exercise of municipal power. This claim was improper under the circumstances.

In Rio an officer was sent on shore by his commanding officer to arrest deserters, and recognizing one in the streets of the city attempted his arrest, and upon his running away wounded him in such a manner that the man subsequently died in hospital. In this case the officer concerned, who was arrested by the local police, was held and duly tried for murder, though subsequently released. In this assertion of its sovereign rights the Brazilian Government was entirely justified by international law.

It is especially enjoined upon the officers and men of the United States Navy by the regulations which govern them that the territory and territorial authority of foreign civilized nations in amity with the United States shall be scrupulously respected. The landing of men to capture deserters or of armed forces for any purpose is forbidden, as well as the granting of leave to large bodies of men without the permission of the local authorities.

The question of affording asylum on board of vessels of war in foreign ports is discussed separately in another place.

Section 17.—Immunities of Merchant Vessels.

According to the general interpretation of the rules of international law a merchant vessel lying in a foreign port is as completely under the jurisdiction of that foreign State as a citizen of another State would be on land.

The rule held by the French, however, is different; it is their view that the crew of a merchant ship lying in a foreign port is not like a party of isolated strangers traveling in a foreign country, but that it is an organized body of men, governed internally by laws of their country, enrolled under its authority, and placed under an officer who has a standing and recognition by law. Hence, although the merchant vessel is not representative of the national government or altogether a public vessel, yet it carries about it a sort of national atmosphere which it does not lose in foreign waters. The French Government and courts, holding this view, find a distinction between acts and offenses connected with the internal order and discipline of the ship, when the peace of the port is not disturbed, and acts which have an external effect, either directly or indirectly. The former they leave to the laws of the State to which the ship belongs; the latter they regard as subject to the laws of the port.

For example, the French courts have taken jurisdiction in the case of murder committed on board of a foreign merchant vessel in a French port, though both the murderer and his victim were members of the crew. This was done upon the ground that a crime of such gravity amounts to

a disturbance of the peace of the port. Crimes committed on board by or upon persons not belonging to the ship are, according to the French view, punishable under the law of the port. Whatever doubts may exist as to assuming jurisdiction over the internal affairs of vessels lying in the stream, there seems to be more reason for exercising local jurisdiction when vessels are moored to the shore or wharves of a foreign port, a position giving such continuity with the land and the inhabited portions of foreign territory as to make a closer relationship with its jurisdiction and its affairs. The Supreme Court of the United States decided, for instance, in the case of a Belgian steamer moored to a dock at Jersey City, that crimes of such a nature as to disturb the tranquillity of the port or the peace and dignity of the country should be dealt with by the courts of the country at whose port the merchant vessel is lying.

Vessels passing through the territorial waters of a State are theoretically in the same position with respect to the jurisdiction of the State as vessels lying at anchor in ports or harbors of the State. In the one case, as in the other, the State may be affected by external acts of those on board. As regards the coast waters, there may be danger of smuggling, trespassing on fisheries, reckless navigation, collision, etc., just as in the ports there is the necessity of preserving the peace, enforcing the customs laws and harbor regulations. But so far as the internal life of passing ships is concerned there seems to be little reason for interference with foreign vessels using the territorial waters of the State.

As to such vessels Hall says:

> The State is both indifferent to and unfavorably placed for learning what happens among a knot of foreigners so passing through the territory as not to come in contact with the population. To attempt to exercise jurisdiction in respect to acts producing no effect beyond the vessel, and not tending to do so, is of advantage to no one.

It has been held by our courts and by the State Department that the United States hold no jurisdiction over offenses committed by foreigners against each other upon the high seas, and the remarks made by Judge Betts in the case of the *Reliance* would not be inappropriate to the matter referred to in the last paragraph. He said:

> In my judgment it would be lamentable if courts were compelled to defer the business of citizens of the country to bestow their time in litigation between parties owing no allegiance to its laws and contributing in no way to its support.

Notwithstanding a tendency on the part of many nations, including the United States, to favor the French rule as to exemption from the jurisdiction of the port in the internal affairs of a merchant vessel when the peace or laws of the port are not affected, still this tendency is not authoritative unless supported by a special consular convention or treaty. The United States have made conventions of this kind, conferring on consuls jurisdiction over disputes between masters, officers, and crews of merchant vessels, with Austria-Hungary, Belgium, Colombia, Denmark, Santo Domingo, France, Germany, Greece, Italy, the Netherlands, Portugal, Russia, Salvador, Sweden and Norway, and Tripoli.

Until this tendency becomes accepted as a general usage and rule, the position of the United States may be given in the words of the late Chief Justice Waite in 1875, as follows:

> As to the general law of nations, the merchant vessels of one country visiting the ports of another for the purpose of trade subject themselves to the laws which govern the port they visit so long as they remain, and this as well in war as in peace, unless it is otherwise provided by treaty.

SECTION 18.—RIGHT OF ASYLUM.

(*a*) *In legations.*—In the United States and in Europe, with the exception of Spain, the rule may be considered as established that a legation does not grant asylum either to ordinary criminals or to persons charged with offenses against the State. In Spanish-American States the usage is different. Spain is the only European country which has of late years shared this usage with the Central and South American republics.

A Spanish decision, however, that of the council of Castile in the case of the Duke of Ripperda, in 1726, is often quoted as stating the merits of this question clearly and logically. The question submitted to the council was whether, without a violation of the law of nations, the Duke of Ripperda, charged with treason, could be forcibly taken from the English legation at Madrid. The reply of the council was in the affirmative on the following grounds:

To act otherwise would be to employ a system which has been adopted to facilitate the intercourse of sovereigns, for the destruction and ruin of their authority. To extend the privileges accorded to the hotels of ambassadors, in favor of merely ordinary offenses, to persons intrusted with the finances, the powers, and the secrets of a State, when they have betrayed the duties of their office, would be to introduce into the world a principle most injurious to all nations. If this maxim were to become the rule, sovereigns would be obliged to see maintained at their own courts those persons most actively engaged in machinations for their ruin.

In 1875 Secretary Fish addressed a letter to the minister from Haiti which contained the following:

The right to grant asylum to fugitives is one of the still open questions of public law. The practice, however, has been to tolerate the exercise of that right not only in American countries of Spanish origin, but in Spain itself, as well as in Haiti. This practice, however, has never addressed itself to the full favor of this Government. In withholding approval of it we have been actuated by respect for consistency. * * * It is believed, however, to be sound policy not to expose a minister in a foreign country to the embarrassments attendant upon the practice. Still this Government is not by itself, and independently of all others, disposed to absolutely prohibit its diplomatic representatives abroad from granting asylum in every case in which application therefor may be made.

The printed personal instructions to the diplomatic agents of the United States in 1885 contain the following:

In some countries, where frequent insurrections occur and consequently instability of government exists, the practice of exterritorial asylum has become so firmly established that it is often invoked by unsuccessful insurgents, and is practically recognized by the local government to the extent even of respecting the premises of a consulate in which such fugitives may take refuge. This Government does not sanction the usage, and enjoins upon its representatives in such countries the avoidance of all pretexts for its exercise. While indisposed to direct its agents to deny temporary shelter to any person whose life may be threatened by mob violence, it deems it proper to instruct its representatives that it will not countenance them in any attempt to knowingly harbor offenders against the laws from the pursuit of the legitimate agents of justice.

Consuls have not the immunities or exterritorial rights that pertain to diplomatic agents; but, as mentioned in the preceding instructions, a usage has grown up to such an extent in certain countries with respect to an asylum in consulates that its recognition as a fact can not be avoided. A consul who to save life permits such asylum does it upon his own responsibility, and, if the usage of the place permitted it, would be sustained in all probability to that extent by the Government of the United States.

(*b*) *On board of ships of war.*—Under the general rule of respect for the laws of a friendly State it is considered wrong by the usages of international law to afford an asylum to a criminal or to a person charged with a nonpolitical crime. Of course a commanding officer must judge for himself whether the crime charged as nonpolitical is used as a pretext to prevent asylum being received by a person flying for his life on account of his political acts. If, however, a criminal of any kind succeeds in getting aboard a vessel of war he can not be apprehended or followed on board the vessel by the police or local authorities. No such entry can be made or allowed for any purpose whatever.

If a political refugee is granted asylum from motives of humanity the right to protect him in certain localities has become established by usage. Asylum should not be offered, but can be granted under certain circumstances; but under no circumstances should any discrimination be made between political parties, nor should political refugees be allowed to maintain communication with the shore for political or other purposes.

The French give to their naval officers the right to refuse asylum under any circumstances, but forbid them to permit any pursuit or search on board of their vessels by the local authorities if the refugee is once given asylum. A refugee can only be delivered up in this case by means of the system of extradition, the delivery being granted upon the request of the government concerned.

The French rules state that the commanding officer has the moral duty of receiving political refugees, but upon condition of observing strict neutrality between the two parties. He is to be as humane and generous toward one side as the other, to be vigilant in preventing any communication on the part of the refugees with the shore, and to land them, as soon as circumstances will permit, in a place where they will be in complete security.

The British rule is given in the Instructions of the British Admiralty (1893) in article 448, as follows:

(1) Ships of war in the ports of a foreign country are not to receive on board persons, although they may be British subjects, seeking refuge for the purpose of evading the laws of the foreign country to which they may have become amenable.

(2) During political disturbances or popular tumults refuge may be afforded to persons flying from imminent personal danger. In such cases care must be taken that the refugees do not carry on correspondence with their partisans from Her Majesty's ships, and the earliest opportunity must be taken to transfer them to a place of safety.

(3) Except in extreme cases passages should not be given to the subjects of foreign governments.

(4) Whenever circumstances may permit naval officers should communicate with Her Majesty's diplomatic or consular servants before taking steps for the reception of refugees on board their ships.

The regulations of the United States Navy as amended in 1894 direct as follows:

ARTICLE 287. The right of asylum for political and other refugees has no foundation in international law. In countries, however, where frequent insurrections occur and constant instability of government exists, local usage sanctions the granting of asylum, but even in the waters of such countries, officers should refuse all applications for asylum except where required by the interests of humanity in extreme or exceptional cases, such as the pursuit of the refugee by a mob. Officers must not directly or indirectly invite refugees to accept asylum.

By article 28 of the general act of the Brussels Conference relative to the African slave trade signed July 2, 1890, and ratified by almost all of the civilized powers, the United States being among the number,

it was agreed that "any slave who may have taken refuge on board a ship of war flying the flag of one of the signatory powers shall be immediately and definitively freed; such freedom, however, shall not withdraw him from the competent jurisdiction if he has committed a crime or offense at common law."

(*c*) *On board merchant vessels.*—Merchant vessels having no immunity from foreign jurisdiction can not, by the rules of international law, properly grant asylum to political or other refugees. Such custom, if permissible, would lead to great abuses.

Even in the case of ships of war it is to be exercised with great caution. But ships of war are public vessels, with responsible commanders, and under direct and constant control of governmental authority. In the arguments advanced in favor of an asylum on board merchant vessels in the very few cases on record the flag seems to be the chief thing considered. Once under the flag of a foreign State it is claimed that the refugee should be considered as free. It is doubtful whether those who advocate the right of asylum in merchant vessels would go so far as to hold that refugees may escape directly from their own State to foreign merchant vessels at anchor in their own ports.

Thus far this claim has been advanced only in the case of political refugees who having escaped to another country embarked on a merchant vessel for passage to a third country, by a voyage which included calls at the ports of their own country. But any person entering the jurisdiction of his own State does it knowingly and at his own risk. When, instead of preserving the asylum and refuge gained by reaching a foreign country, he deliberately exposes himself to arrest and punishment by entering the territorial waters of the country in which he is considered an offender he has no claim to the protection of any other State.

In the case of Sotelo, a Spanish ex-minister arrested on board of a French mail steamer plying between Marseilles and Gibraltar in a Spanish port, and also of another Spanish subject arrested as a passenger on board of a vessel under the British flag in a Spanish port, both the French and the English Governments decided that the Government of Spain was simply exercising a right which appertained to that State.

In the case of Gomez, a political fugitive from Nicaragua, Secretary Bayard took the same ground that a merchant vessel was amenable to the jurisdiction of the port to which it had repaired for purpose of trade.

In the Barrundia case the facts were as follows: General Barrundia had been attempting to stir up from the Mexican border an insurrection in Guatemala while the latter State was at war with Salvador. When upon the complaint of the Guatemalan Government the Government of Mexico required Barrundia to leave the borders of Guatemala, he proceeded to Acapulco, a Mexican port, and with two of his followers who subsequently landed in Salvador, embarked on board an American mail steamer, ostensibly for Panama, but it may be considered from the attending circumstances and with reasonable certainty for Salvador. Upon reaching a Guatemalan port his arrest was determined upon by the Guatemalan authorities. The captain of the mail steamer declined giving him up without the authority of the American minister resident at Guatemala. When the letter of the minister was received advising the master to give Barrundia up to the Guatemalan officials and stating at the same time that the Guatemalan Government had promised that his life would be spared, the arrest was permitted; but Barrundia,

resisting arrest, was killed. The American minister was removed for authorizing the arrest and the senior naval officer of the United States in port relieved from his command for not offering an unsolicited asylum to Barrundia on board of his vessel.

The Guatemalan Government desired the arrest of Barrundia upon the stated grounds of self-preservation, and held also that for this reason Barrundia was not to be allowed to go out of their jurisdiction until peace was declared with Salvador.

If it be claimed in this case that Barrundia possessed the right of asylum because he was on board of a merchant vessel carrying the American flag, it is hardly too much to say that there is no foundation in international law for this position. The only possible excuse for this claim is the assertion that the Spanish American States do not possess all the rights of sovereign States, and that there should be an exceptional rule adopted in their case in regard to an asylum on board merchant ships, as there is in the case of legations.

It is suggested by Prof. John B. Moore that in view of the character that mail steamers are assuming as subsidized steamers of national and almost public character, sailing on regular and long-established schedules, that there should be positive treaty agreements between the governments concerned that their status in these respects should be similar to vessels of war. He says:

> A precedent for such negotiations might have been found in the postal convention between France and Great Britain of September 24, 1856, by which it is provided that vessels chartered or subsidized by government when employed in the service regulated by the treaty shall be considered and treated as vessels of war, and that passengers admitted on board such vessels, who do not think fit to land, shall not under any pretext be removed from on board, be liable to search, or subjected to the formality of a visa of their passports.

SECTION 19.—JURISDICTION OVER EXTERRITORIAL OFFENSES.

A number of European States, among them being France, Belgium, Germany, Austria, Italy, the Netherlands, Sweden and Norway, and Russia, allow their tribunals to take cognizance in certain cases of crimes committed by foreigners in foreign jurisdiction or out of their territorial bounds. The crimes aimed at are, for the most part, those committed against their own subjects in foreign parts, and "offenses against the safety of the State." This claim of jurisdiction is not favorably looked upon by the leading American and English publicists, and is rejected by a number of States, the United States being among the number.

Hall says, very sensibly, concerning this usage:

> Whether laws of this nature are good internationally; whether, in other words, they can be enforced adversely to a State which may choose to object to their exercise, appears, to say the least, to be eminently doubtful. It is indeed difficult to see upon what they can be supported. * * * To assert that this right of jurisdiction covers acts done before the arrival of foreign subjects in the country is in reality to set up a claim to concurrent jurisdiction with other States as to acts done within them, and so to destroy the very principle of exclusive territorial jurisdiction to which the alleged rights must appeal for support.

The decision of the United States in the Cutting case gives the last precedent in this country as to the jurisdiction of the courts of one State over acts of foreigners in a foreign State. Secretary Bayard wrote upon this subject:

> The Government is still compelled to deny what it denied on the 19th of July (1886) and what the Mexican Government has executively and judicially maintained,

that a citizen of the United States can be held under the rules of international law to answer in Mexico for an offense committed in the United States simply because the object of that offense happened to be a citizen of Mexico.

The inclusion of political offenses in this claim of jurisdiction over acts done in other countries makes it unlikely that countries which value political liberty and their right of asylum will easily admit the claim. On the other hand, the claim is now embodied in the municipal legislation of so many countries that it must be admitted that the common-law doctrine of the territoriality of crime is by no means so universally recognized as to warrant the assumption that it is a rule of international law.

SECTION 20.—EXTRADITION.

Kindred to the subject of the right of asylum in legations and vessels within the territory of the fugitive's State is the question of the right of asylum of fugitives who reach the territory of a foreign State. But that brings up the whole subject of extradition, which comprises the cases of common-law criminals as well as of political refugees. Extradition treaties are of recent origin. The first treaty by us providing for extradition was made in 1794, with Great Britain. Before the introduction of treaties criminals of one country were usually safe if they succeeded in escaping to the territory of another State, but it may be said in extenuation of this that there was less intercourse and less facility for escape then than now. The next treaty made by the United States was in 1842, but from that time the practice of making treaties upon this subject has grown steadily until now the United States have in force treaties providing for extradition with most of the civilized States of the world.

The first question that arises upon this subject is whether extradition is a matter of international duty. The answer must be in the negative, but the opinion of the civilized world favors it, and it may become, before long, agreed upon as a duty of that kind.

As a matter of fact, there have been cases of extradition made under special circumstances, without treaty. In 1864 Argüellos, governor of a district in Cuba, sold a number of freed Africans into slavery by means of forged papers and then escaped to New York. There was no treaty of extradition between Spain and the United States, but the Spanish Government requested his arrest and surrender as an act of comity not only on account of the enormity of the offense, but because his presence in Cuba was necessary for the liberation of the persons sold into slavery. Secretary Seward, with the sanction of the President, ordered the arrest and surrender as an executive act without giving opportunity for judicial inquiry into the legality of the proceeding. The surrender of Tweed was an act of comity on the part of Spain of somewhat similar nature.

But in the case of the United States *v.* Rauscher, in 1886, the Supreme Court, after an elaborate and exhaustive discussion, decided in an opinion delivered by Justice Miller:

(1) That there was no rule of international law requiring States to deliver up fugitives from justice from other States.
(2) That in the United States the question of extradition was exclusively a Federal one.
(3) That a person extradited under treaty can be tried for that offense only for which he was extradited.

Woolsey says:

The case of political refugees has some points peculiar to itself. A nation, as we have seen, has a right to harbor such persons, and will do so unless weakness or political sympathy lead it to the contrary course.

Questions often arise as to the definition of political offenses. In the case of the St. Albans raid from Canada, in 1864, in which the bank was pillaged, private property seized and burned, etc., the Canadian Government held that as the person in command held a Confederate commission the offense was a political one.

Similar opinions have been held by our authorities in regard to risings within Mexican territory near our border. In the case of Castioni, which involved the killing of a Swiss councilor, it was held by the English courts that the act was not of murder, but had a political character, the ground taken being that the fatal shot was fired with the purpose of advancing and furthering the object of the rising against the local government, and hence the offense was a political one.

The United States have recently entered into treaties of extradition providing that an attempt against the life of the head of a foreign government or his family shall not be considered a political offense or an act connected with such an offense.

A case has recently occurred in which both the right of asylum and extradition for political offenses were involved. It is referred to in the annual message of the President of the United States for 1894 in the following terms:

> The Government of Salvador having been overthrown by an abrupt popular outbreak, certain of its military and civic officers, while hotly pursued by infuriated insurgents, sought refuge on board the United States war ship *Bennington*, then lying in a Salvadorean port. Although the practice of asylum is not favored by this Government, yet in view of the imminent peril which threatened the fugitives, and solely from considerations of humanity, they were afforded shelter by our naval commander; and when afterwards demanded under our treaty of extradition with Salvador for trial on charges of murder, arson, and robbery, I directed that such of them as had not voluntarily left the ship be conveyed to one of our nearest ports, where a hearing would be had before a judicial officer in compliance with the terms of the treaty. On their arrival at San Francisco such a proceeding was promptly instituted before the United States district judge, who held that the acts constituting the alleged offense were political, and discharged all the accused except one Cienfuegoes, who was held for an attempt to murder. Thereupon I was constrained to direct his release, for the reason that an attempt to murder was not one of the crimes charged against him and upon which his surrender to the Salvadorean authorities had been demanded.

SECTION 21.—EXTERRITORIAL ACTS BY ORDER OF THE STATE.

These acts, when committed by an individual or by a body of individuals under orders of the government of a State, are acts for which the individual can not be held responsible. The responsibility rests with the State ordering the violation of territory.

Acts of this nature are classed as hostile and operations of "imperfect war" by some writers on international law, and can only be justified by the right of self-preservation and self-defense. As Mr. Webster said in his correspondence with Lord Ashburton with respect to the *Caroline* affair, there must exist, and be shown to exist, "a necessity for self-defense instant, overwhelming, and leaving no choice of means and no moment for deliberation," and it should further appear that the agents of the Government taking part in the exigency "did nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it."

The case known as the *Caroline* case was as follows:

> During the disturbances in Upper Canada in 1837 an American steamer called the *Caroline* had been actively engaged in carrying arms, etc., from the American side of the Niagara River to the Canadian rebels. While lying on the American side of the river the *Caroline* was boarded by a party of Canadian loyalists, set on fire, and sent down the stream, finally going over the Falls of Niagara and being dashed to pieces. An American citizen was killed in the affray and several others wounded.

One of the party of loyalists—McLeod by name—was arrested afterwards while within the territory of New York and thrown into prison on the charge of having been concerned in the destruction of the *Caroline* and the alleged murder of the American who was killed on board.

The British Government made demand for his release upon the grounds that it was responsible for McLeod's acts and that the transaction in which he had been engaged was of a public character, planned and executed by persons duly authorized by the colonial government to take such measures as might be necessary for protecting the property and lives of Her Majesty's subjects, and being therefore an act of public duty they can not be held responsible to the laws and tribunals of any foreign country.

Mr. McLeod was under indictment in the State courts of New York, the supreme court of which declined to release him from their jurisdiction, notwithstanding the desire of the General Government. He was therefore put upon his trial, but the failure of the jury to convict him on the evidence put a practical termination to the matter. But to prevent the recurrence of such controversies in the future, by which the act of one of the States might jeopardize the foreign relations of the Federal Government, an act was passed by Congress providing for bringing such cases by writ of habeas corpus under the cognizance of the courts of the United States at the inception of the proceedings. Besides the justification shown in the way of self-defense, the British Government admitted that an apology for the violation of the territory should have been made at the time.

The seizure of St. Marks, Fla., and Amelia Island in 1815 and 1817, respectively, by the United States was claimed in the same way as a necessity, a justifiable invasion of foreign territory to subdue an expected assailant.

The seizure by Spain of the steamer *Virginius* carrying the American flag upon the high seas in 1873, has been justified in the same way by several high authorities, Professor Woolsey, Mr. R. H. Dana, and Mr. George Ticknor Curtis being among the number. Mr. Curtis, in discussing the matter, said:

> We rest the seizure of this vessel on the great right of self-defense, which, springing from the law of nature, is as thoroughly incorporated into the laws of nations as any right can be.

The Attorney-General of the United States, however, took the following ground:

> Spain no doubt has a right to capture a vessel, with an American register and carrying the American flag, found in her own waters assisting or endeavoring to assist the insurrection in Cuba; but she has no right to capture such a vessel on the high seas upon an apprehension that, in violation of the neutrality or navigation laws of the United States, she was on her way to assist said rebellion.

Even assuming that the vessel was lawfully seized, there was no justification for the summary execution of foreigners by order of a court-martial; and both the United States and England demanded reparation in behalf of those persons of their respective nationalities who had been executed by the captors of the *Virginius*. This reparation Spain eventually had to make.

SECTION 22.—RESPONSIBILITY OF A STATE FOR MOB VIOLENCE.

The weight of modern opinion seems to favor the placing of foreigners, in cases of losses or damage by mob violence, upon the same *footing* as the citizens or subjects of the State.

Bluntschli says upon this point that States are not obliged to accord indemnity for losses experienced by foreigners as the result of internal troubles or civil war.

Hall takes even stronger ground, and says:

When a government is temporarily unable to control the acts of private persons within its dominions owing to insurrection or civil commotion, it is not responsible for injury which may be received by foreign subjects in their person or property in the course of the struggle, either through the measures which it may be obliged to take for the recovery of its authority or through acts done by the part of the population which has broken loose from control. When strangers enter a State they must be prepared for the risks of intestine war, because the occurrence is one over which, from the nature of the case, the government can have no control; and they can not demand compensation for losses or injuries received, both because, unless it can be shown that a State is not reasonably well ordered, it is not bound to do more for foreigners than for its own subjects * * * and because the highest interests of the State itself are too deeply involved in the avoidance of such commotions to allow the supposition to be entertained that they have been caused by carelessness on its part which would affect it with responsibility toward a foreign State.

Calvo, whose experience as a Latin-American leads him to discuss this question in detail and with much knowledge of current practice, concludes as follows:

(1) That the principle of indemnity and of diplomatic intervention in favor of foreigners on account of loss resulting from civil or internal war has not been admitted by any nation of Europe or America.
(2) That the Governments of powerful nations who exercise or impose this pretended right at the expense of States relatively feeble commit an abuse of power and of strength which nothing known justifies and which is as contrary to their own legislation as is it to international usage and to public propriety.

Several cases have occurred with respect to the question of mob violence in and concerning the United States, two of them having New Orleans as the place of occurrence.

In 1851, after the news had been received of the shooting in Cuba of a number of Americans who had accompanied the Lopez filibustering expedition, riots broke out in New Orleans and Key West against the Spanish residents and consulates. Much injury was done to persons and property. For this Spain demanded reparation. The State Department ruled at that time that the Spanish residents were entitled to such protection only as our citizens were afforded, and that the United States or the State courts were open to them for prosecution for injuries. It was held, however, that the case of the consul was different, and that a just indemnity was due him. Congress voted an indemnity, but did not limit it to the consul.

In 1891, at New Orleans again, a mob, composed of citizens of standing, assembled at the jail and shot or hung a number of Italians who had been arrested for complicity in the assassination of the chief of police of the city. Among these were some persons who were subjects of the King of Italy. The President of the United States, by the Secretary of State, expressed regret at the occurrence, and announced that he proposed to ask for an indemnity from Congress for the families of the murdered men. The Italian Government was not satisfied with this position, but demanded further that the leaders of the mob be criminally prosecuted and punished according to law. With this demand the Government of the United States could not comply, however willing it might be to do so. The matter was entirely within the jurisdiction of the State courts; it was impossible to institute suit in the Federal courts.

In regard to the merits of the case, it would seem that the United States should accept the responsibility, as in fact they have done, for the acts of the mob. The persons killed were, in the first place, in the custody of the State government, and hence for the purposes of international law, in that of the National Government, and therefore entitled to

special protection. In the second place, there was no serious attempt on the part of the local authorities to quell the riot.

The Italian Government eventually withdrew the demand for the punishment of the actors in the affair and accepted a money indemnity instead.

In the case of the massacre of Chinamen at Rock Springs, in Wyoming, in 1885, both the President and the Secretary of State announced most positively, in the words of the latter:

> I should fail in my duty as representing the well-founded principles upon which rests the relation of this Government to its citizens, as well as to those who are not its citizens, and yet are permitted to come and go freely within its jurisdiction, did I not deny emphatically all liability to indemnify individuals of whatever race or country for loss growing out of violations of our public law, and declare with equal emphasis that just and ample opportunity is given to all who suffer wrong and seek reparation through the channels of justice as conducted by the judicial branch of our Government.

If, however, it is manifest that a riot could have been suppressed by means within its control, then, as our State Department claimed in 1878, "a government is liable internationally for damages done to alien residents by a mob which by due vigilance it could have repressed."

CHAPTER III.

JURISDICTION ON THE HIGH SEAS.

SECTION 23.—JURISDICTION OF A STATE OVER ITS PERSONS AND PROPERTY ON THE HIGH SEAS.

A State has jurisdiction over its property and citizens on the high seas when out of the territorial limits of any other State and when carried under its own flag. This jurisdiction is exclusive in time of peace, with the exception of piracy, or when a vessel is chased beyond the 3-mile limit for violation of municipal law, or for some international offense made so by general or special compact, such as the slave trade.

Whether this jurisdiction is founded upon the theory that ships are floating portions and prolongations of the territory of the State whose flag they carry, or whether it is based upon the theory that the jurisdiction arises in virtue of its control over vessels as its property where no local jurisdiction exists, does not matter; the right exists as a fact, and has been held by no nation with greater persistency than by the United States.

With respect to ships of war and other public commissioned vessels belonging to the State there is little dispute. As Hall says:

> These vessels represent the sovereignty and independence of their States more fully than anything else can represent it on the ocean; they can only be met by their equals there; and equals can not exercise jurisdiction over equals. The jurisdiction of their own State over them is exclusive under all circumstances and any act of interference with them on the part of a foreign State is an act of war.

SECTION 24.—JURISDICTION OVER MERCHANT VESSELS ON THE HIGH SEAS.

Merchant vessels on the high seas are also under the jurisdiction of the country whose flag they fly. This applies to foreigners who happen to be on board as well as to the citizens or subjects of the State whose flag covers the vessel.

In time of peace vessels of war have no right under international law to visit and search or take possession of merchant ships of other States than their own in the ordinary and lawful pursuit of commerce. The exception in the case of suspicions that the vessel is piratical is one in which great care is to be observed, for if it happens that the suspicions were unfounded the captor is liable to heavy damages. One of the best enunciations of the doctrine that each State has exclusive jurisdiction over all persons on board of its merchant vessels is given in a communication from our State Department in 1879, in which it is stated:

> No principle of public law is better understood nor more universally recognized than that merchant vessels on the high seas are under the jurisdiction of the nation to which they belong, and that as to common crimes committed on such vessels while on the high seas the competent tribunals of the vessels' nation have exclusive jurisdiction of the questions of trial and punishment of any person thus accused of

the commission of a crime against its municipal laws; the nationality of the accused can have no more to do with the question of jurisdiction than it would had he committed the same crime within the geographical territorial limits of the nation against whose municipal law he offends.

The effect of this jurisdiction is at times to change the character of a continuing act from a lawful one in foreign waters to an offense against its own country when the vessel reaches simultaneously the high seas and the civil and criminal jurisdiction of its own State. The transportation of persons or of property of certain descriptions may be lawful commerce within the foreign jurisdiction, but may be forbidden by the laws of the State to which the ship belongs.[1]

In case of collisions occurring on the high seas between two vessels of different but foreign nationalities, the Supreme Court of the United States has decided that admiralty courts of the United States may take jurisdiction. Judge Deady, of the United States district court of Oregon, in rendering a decision as to a case of this kind, said:

The parties can not be remitted to a home forum, for, being subjects of different governments, there is no such tribunal. The forum which is common to them both by the *jus gentium* is any court of admiralty within the reach of whose process they may both be found.[2]

A case has occurred, which is mentioned by Hall, where a collision has taken place between a British vessel of war and a merchant ship, and the former has allowed a trial to be carried on by a foreign court of admiralty; not, however, in submission to the jurisdiction of the court, but for the purpose of having the facts of the case established and the damages judicially assessed.

SECTION 25.—DETERMINATION OF THE NATIONAL CHARACTER OF VESSELS.

Public ships of the State consist of vessels of war, dispatch vessels, transports, storeships, tenders, revenue marine vessels, surveying vessels, and other vessels temporarily or permanently employed in service for public purposes only. It is necessary that such vessels should be given a public character by the law of the State or by being commanded by an officer holding such warrant or commission as would render the vessel a public one under such law.

A vessel of war is distinguished from other vessels by her external appearance and by the flag and pennant which are carried. As a rule, the pennant is not carried by other than vessels of war or vessels in the service of the national government. The armament of a vessel and the military character of her crew also may be considered as external signs of her employment.

The nationality of a vessel of war upon the high seas is generally determined by the display of her colors and pennant and if necessary also by the firing of a gun, which the French call a *coup d'assurance.*

If notwithstanding these evidences a doubt is entertained as to the vessel being properly a public vessel or ship of war, the statement of the commander on his word of honor that the vessel is of that character is customarily accepted as a matter of courtesy. The commission from the State under which the commanding officer serves must, however, be received as conclusive and as a bar to all further inquiry.

Judge Story, of the Supreme Court of the United States, says as to this in the case of the *Santissima Trinidad:*

The commission, therefore, of a public ship, when duly authenticated, so far at least as foreign courts are concerned, imports absolute verity, and the title is not

[1] See Regina *v.* Lesley, Snow's Cases, p. 187.
[2] See Snow's Cases, pp. 192–193.

examinable. * * * This has been the settled practice between nations; and it is a rule founded on public convenience and policy, and can not be broken in upon without endangering the peace and repose as well of neutral as of belligerent sovereigns.

Merchant vessels and vessels belonging to private owners to be entitled to carry the flag of their country must satisfy such conditions as may be imposed by the laws of their State with reference to construction, ownership, and the nationality and composition of officers and crew.

The display of the flag of the State by a merchant or private vessel is prima facie evidence of her nationality. In a number of States the national flag of the mercantile marine differs from the national flag carried by vessels of war. In the United States the flag is the same for both services, but vessels of the Revenue Marine Service of the United States have a flag differing in character from that carried by both the mercantile and naval services. This flag, however, is carried only in home waters, vessels of the Revenue Marine displaying the American ensign alone when abroad.[1]

As a matter of courtesy, vessels make known their nationality upon the high seas by an exchange of colors.

The papers necessary to determine the nationality of a merchant vessel and the nature of the voyage vary in different States, but in general terms they may be said to consist, for vessels engaged in foreign trade, of (1) a certificate of registry, (2) the muster roll of the crew, (3) the log book, (4) the shipping articles, (5) the charter party, (6) invoices of cargo, (7) bill of lading.

In regard to the national character of vessels Wheaton says:

The character of ships depends on the national character of the owner, as ascertained by his domicil; but if a vessel is navigating under the flag and pass of a foreign country, she is to be considered as bearing the national character of the country under whose flag she sails; she makes a part of its navigation, and is in every respect liable to be considered as a vessel of the country; for ships have a peculiar character impressed upon them by the special nature of their documents, and are always held to the character with which they are so invested, to the exclusion of any claims of interest which persons resident in neutral countries may actually have in them.

To be a vessel of the United States it is necessary to have a register, or an enrollment and a license, or a license only if the vessel be of less than 20 tons and engaged in trading or fishing. If used for pleasure only, the vessel should have a license, whatever her tonnage, and she may have an enrollment if of 20 tons. All vessels engaged in foreign trade must be registered except those plying upon the lakes of our northern frontier.

A vessel of less than 5 tons can engage in domestic trade or the fisheries without a marine document and be free from the penalties otherwise prescribed. But she must be qualified in other respects.

There are seven classes of vessels entitled to papers or documents as vessels of the United States:

(1) Such as are built in the United States for citizens of the United States and remain in continuous, exclusive ownership of citizens of the United States.

(2) Vessels built in the United States under foreign ownership, in whole or in part, and recorded as such, upon their becoming the property of citizens of the United States exclusively.

[1] It is proposed to use this distinguishing flag in the future only in addition to the national ensign.

(3) Vessels captured in war by citizens of the United States, lawfully condemned as prize, and owned wholly by citizens of the United States.

(4) Vessels adjudged to be forfeited for a breach of the laws of the United States and purchased and owned wholly by citizens of the United States.

(5) Vessels under a foreign flag wrecked in the United States and purchased and repaired by a citizen of the United States, if the repairs are equal to three-fourths of the cost of the vessel when so repaired.

(6) Vessels of the United States Government sold to a citizen of the United States.

(7) Steamboats for employment only in a river or bay of the United States, owned wholly or in part by an alien resident within the United States.[1]

In addition to these classes there are certain foreign-built vessels which have been granted registers as vessels of the United States, with all rights as such, by name in special acts of Congress.

There are seven classes of vessels that are not entitled to documents as vessels of the United States, as follows:

(1) Vessels built in a foreign country.

(2) Vessels built in the United States under foreign ownership, in whole or in part, and not recorded as such; or vessels sold, in whole or in part, to citizens of other countries after having been documented as vessels of the United States.

(3) Vessels which have not been continuously in command of a citizen of the United States.

(4) Vessels owned, in whole or in part, by citizens who usually reside abroad, during the continuance of such residence, unless they are consuls of the United States, or agents for or partners in some trading house consisting of the citizens of the United States, actually carrying on trade with the United States.

(5) Vessels owned, in whole or in part, by naturalized citizens residing for more than one year in the country of their origin, or for more than two years in any foreign country, unless they be consuls or other public agents of the United States. But such a vessel may be documented anew upon sale in good faith to a resident citizen of the United States.

(6) Vessels which were authorized to sail under a foreign flag and to have the protection of any foreign government during the rebellion.

(7) Vessels of the United States seized or captured and condemned under the authority of any foreign power, even after again becoming the property of citizens of the United States, unless such citizens shall have been the owners at the time of seizure or capture, or shall be the executors or administrators of such owners, and shall have regained the ownership of such vessel by purchase or otherwise.[2]

Sea letters and passports for vessels of the United States have fallen into disuse, and the statutes of the United States referring to them are of doubtful effect. Although no vessel is a vessel of the United States unless she be documented as such, both the Treasury and the State Departments concur in permitting the use of the flag of the United States by undocumented vessels owned wholly by American citizens.

The United States Consular Regulations for 1888 read as follows upon this subject:

ART. 317. The privilege of carrying the flag of the United States is under the regulation of Congress, and it may have been the intention of that body that it

[1] U. S. Rev. Stat., secs. 4131-4320.

[2] U. S. Rev. Stat, secs. 4131-4312. See also Wynkoop's Vessels and Voyages.

should be used only by regularly documented vessels. No such intention, however, is found in any statute. And as a citizen is not prohibited from purchasing and employing abroad a foreign ship, it is regarded as reasonable and proper that he should be permitted to fly the flag of his country as an indication of ownership and for the due protection of his property. The practice of carrying the flag by such vessels is now established. The right to do so will not be questioned, and it is probable that it would be respected by the courts.

ART. 318. It should be understood, however, that such foreign-built vessels not registered, enrolled, or licensed under the laws of the United States, although wholly owned by citizens thereof, can not legally import goods, wares, or merchandise from foreign ports, and are subjected in the coasting trade to disabilities and exactions from which documented vessels of the United States are exempt.

The papers carried by such vessels consist of the bill of sale, accompanied by a certificate from the United States consul or collector of customs at whose office the bill of sale was recorded.

Foreign-built yachts can carry the American flag under the above rule.[1] By decision of the Treasury Department[2] a vessel employed exclusively for pleasure, whatever her size, need not have any marine documents, but she will be subject to light-money dues. Exemption, however, does not mean exclusion, and a license authorizes the vessel to proceed from port to port of the United States without clearance or entrance at the custom-house, and by sea to foreign ports without clearance. On her return to the United States she must make entrance, but she need not pay tonnage duty. Yachts are not allowed to transport merchandise or carry passengers for pay. They must use a signal of the form, size, and colors prescribed by the Secretary of the Navy, and naval architects in the employ of the United States are permitted to examine and copy the models of licensed yachts.[3] The signal prescribed is the "American ensign, substituting in the field a white foul anchor, surrounded by thirteen white stars in a circle, in lieu of a star for each State."[4]

A merchant vessel of the United States engaged in trading on a lawful voyage is allowed to carry cannon and small arms for protection and defense against lawless or partially civilized communities or piratical crews, and she may resist attacks from pirates or any armed vessel which is not a public armed vessel of a friendly nation to the United States.[5]

A list of papers required to be carried by vessels of the United States and of other nationalities will be found in the appendix.

SECTION 26.—MUNICIPAL SEIZURE BEYOND THE 3-MILE LIMIT.

The British "hovering act" passed in 1736 assumed for certain revenue purposes a jurisdiction of 4 leagues from the coasts by prohibiting foreign goods to be transshipped within that distance without payment of duties. This act has been repealed, but a similar provision still exists in the revenue laws of the United States.

Dana, in his note to Wheaton, says upon this point:

The statute does not authorize a seizure of a foreign vessel when beyond the territorial jurisdiction. The statute may well be construed to mean only that a foreign vessel coming into an American port and there seized for a violation of revenue regulations committed out of the jurisdiction of the United States may be confiscated, but that to complete the forfeiture it is essential that the vessel shall be bound to

[1] See letter of collector of customs of New York, appendix.
[2] See p. 3, Wynkoop's Vessels and Voyages.
[3] U. S. Rev. Stat., sec. 4215.
[4] See p. 33, Wynkoop's Vessels and Voyages.
[5] U. S. Rev. Stat., sec. 4295.

and shall come within the territory of the United States after the prohibited act. The act done beyond the jurisdiction is assumed to be part of an attempt to violate the revenue laws within the jurisdiction.

In the case of Rose *v* Himely, 1808 (4 Cranch, 241), the Supreme Court of the United States held that a seizure, under customs regulations, of a foreign vessel beyond the territorial waters of a State was not valid.

When a merchant vessel, or some person on board, commits an offense against the laws of a foreign territory while within that territory, the vessel may be pursued outside of the 3-mile limit and there seized. This can only be done when the chase is commenced while the vessel is within the 3-mile limit or has just escaped beyond it. This extended pursuit is considered as necessary to the efficient execution of the laws of the State.

Woolsey says upon this point:

For a crime committed in port a vessel may be chased into the high seas and there arrested without a suspicion that territorial rights have been violated.

If the vessel escapes from her pursuers, she can not be taken at another time upon the high seas by ships of the offended State.

SECTION 27.—PIRACY.

(*a*) *Definition and character of piracy.*—At the present day piracy is nearly extinct; but in former days it was common in every sea.

Nearly the last remnants of the old kind of pirates in civilized regions were the buccaneers of the Gulf of Mexico and the Spanish Main. In certain Asiatic waters they still exist to a limited extent.

In a charge to a grand jury in 1668 Sir Leoline Jenkins, an English judge, said:

You are to inquire of all pirates and sea rovers. They are, in the eye of the law, *hostes humani generis*—enemies of all mankind. They are outlawed, as I may say, by the laws of all nations; that is, out of the protection of all princes and all laws whatsoever. Everybody is commissioned and is to be armed against them, as against rebels and traitors, to subdue and root them out.

That which is called robbing upon the highway, the same being done upon the water is called piracy.

Judge Story, in delivering the opinion of the Supreme Court of the United States, in 1820, said:

All writers concur in holding that robbery or forcible depredation upon the sea—*animo furandi*—is piracy. Pirates are freebooters upon the sea, not under the acknowledged authority or deriving protection from the flag or commission of any government.

A pirate, then, is a highway robber of the sea; but as the sea is the highway of all nations, all nations are concerned and are in duty bound to put a stop to his depredations.

There is practically no difference between the definition of the English courts in 1668 and that of the Supreme Court of the United States in 1820. This definition is of piracy by the law of nations, or, as the Latin phrase goes, *jure gentium*, and it must be carefully distinguished from piracy by municipal law.

A State may by legislation declare any act it pleases piracy, but that does not constitute it piracy by the law of nations. Thus England, by an act of Parliament, and the United States, by an act of Congress, have declared the slave trade to be piracy; and the United States in addition have affixed the same character to certain other criminal offenses when committed on board of our merchant vessels. But in

these cases other nations are not in any way concerned or bound and have no jurisdiction over the offenders.

The true pirate has disappeared from the seas of Europe and America, and therefore the courts have had, practically speaking, no cases of this kind before them for many years.

(*b*) *Insurgents as pirates.*—A part of the definition of piracy applies to insurgents if found upon the seas; they have neither the commission nor the flag of any recognized government; and it may be asked, By what right are their ships of war upon the high seas? It is agreed that they have not the rights of belligerents. On the other hand, an important part of the definition of piracy does not apply to them; they are not depredating upon the ships of all nations indiscriminately; their aim is not private plunder or gain; indeed, their motives may be patriotic and morally praiseworthy, while their acts are directed against but one nation and are for political not mercenary ends.

Why should insurgents then be classed with highway robbers?

It is not necessary, in answer, to assume that insurgents are always right; that is not a question for third parties to determine; it is the duty of the State concerned alone to keep order within its jurisdiction if it wishes to be regarded as a sovereign State in the eye of international law.

Yet there is a considerable amount of legal authority in favor of the opinion that such insurgents may be treated as pirates, *jure gentium.* The lawful government usually tries to impress this character upon its rebels. Claims of this nature were made by Great Britain during our Revolutionary war, by the Federal Government during the civil war of 1861–1865, and by the Government of Spain during the insurrection in that country in 1873. One of the most noted cases of late days of this kind in our own courts was that of the *Ambrose Light.* The *Ambrose Light* was a brigantine captured in 1885 by the U. S. S. *Alliance* in the Caribbean Sea, about 20 miles to the westward of Cartagena. The *Alliance* was looking for the insurgent *Prestan*, by whose orders Colon had been burned, to the great loss of American citizens. The brigantine carried a strange flag, but before coming to displayed a Colombian flag; her papers purported to commission her as a Colombian man-of-war and were from the insurgent leaders at Barranquilla, in Colombia. Believing her commission to be irregular and that she had no lawful authority to cruise as a man-of-war on the high seas, the commanding officer of the *Alliance* took possession of her and brought her to Admiral Jouett, at the time in command of the naval force of the United States in those waters. By Admiral Jouett she was sent to New York for adjudication as a prize. It was found at the trial that she legally belonged to one of the chief military leaders of the insurrection against the Colombian Government, that no one of her officers or crew was a citizen of the United States, and that she was engaged upon a hostile expedition against Cartagena, in Colombia, and was designed to assist in the blockade and siege of that port by the insurgents. The proofs did not show that any other depredations or hostilities were intended by the vessel than such as might be incident to the struggle between the insurgents and the Government of Colombia and to the so-called blockade and siege of Cartagena.

As respects any recognition of the insurgents by foreign powers, it did not appear in evidence that up to the time of the seizure of the vessel on April 1, 1885, a state of war had been recognized as existing, or that the insurgents had ever been recognized as a de facto government, or as having belligerent rights, either by the Colombian

Government, or by our own Government, or by any other nation. The claimants, however, introduced in evidence a diplomatic note from our Secretary of State to the Colombian minister dated April 24, 1885, which it was contended amounted to a recognition, by implication, of a state of war. The Government of the United States claimed the forfeiture of the ship as piratical, under the laws of nations, because she was not sailing under the authority of any acknowledged power. The claimants contended that being actually belligerent she was in no event piratical by the law of nations; but if so, that the subsequent recognition of belligerency by our Government by implication entitled her to a release.

Judge Brown, of the United States district court for the southern district of New York, gave an opinion which included the following statement:

> This great weight of authority, drawn from every source that authoritatively makes up the law of nations, seems to me fully to warrant the conclusion that the public vessels of war of all nations, for the preservation of the peace and order of the seas and the security of their own commerce, have the right to seize as piratical all vessels carrying on, or threatening to carry on, unlawful private warfare to their injury; and that privateers, or vessels of war, sent out to blockade ports, under the commission of insurgents, unrecognized by the government of any sovereign power, are of that character and derive no protection from such void commissions.
>
> In the absence of any recognition of these insurgents as belligerents, I therefore hold the *Ambrose Light* to have been lawfully seized, as bound upon an expedition technically piratical.

On the other ground, however, that the Secretary of State, by his note to the Colombian minister April 24, 1885, had recognized by implication a state of war, the vessel was released.

This judgment in the case of the *Ambrose Light* has called forth much adverse criticism, and, on the whole, the weight of opinion would seem to be against the position taken by Judge Brown, that insurgent vessels not molesting the ships of other nations may be treated as pirates.

Mr. Francis Wharton makes a long criticism upon this case. His conclusion as to insurgents is:

> We ought not in any case to interfere to suppress insurrections in foreign States by attacking either the land or maritime forces of the insurgents. * * * No matter how vehement may be the decrees of foreign governments declaring insurgents to be traitors and pirates, those decrees it should not be for us to execute.

In 1869 Secretary Fish, in a communication to Mr. Bassett, then the minister of the United States to Haiti, in relation to some insurgent vessels, wrote:

> We may or may not at our option, as justice or policy may require, treat them as pirates in the absolute and unqualified sense, or we may, as the circumstances of any actual case shall suggest, waive the extreme right and recognize, where facts warrant it, an actual intent on the part of the individual offenders, not to depredate in a criminal sense and for private gain, but to capture and destroy jure belli.

In 1883 Secretary Frelinghuysen wrote:

> While it (an insurgent vessel) may be outlawed so far as the outlawing State is concerned, no foreign State is bound to respect or execute such outlawry to the extent of treating the vessel as a public enemy of mankind. Treason is not piracy, and the attitude of foreign governments toward the offender may be negative merely so far as demanded by a proper observance of the principle of neutrality.

Secretary Bayard, in 1885, wrote:

> The Government of the United States can not regard as piratical vessels manned by parties in arms against the United States of Colombia when such vessels are passing to and from ports held by such insurgents, or even when attacking ports in the possession of the National Government. * * * There can be no question that such vessels, when engaged as above stated, are not, by the law of nations, pirates, nor can they be regarded as pirates by the United States.

In 1873 the insurgents at Cartagena, Spain, seized the ironclads of the National Government in that harbor, and cruised with them along the coast of Spain with hostile purpose. The Spanish Government proclaimed them pirates, inviting their capture by any naval power. A German naval commander captured one of the vessels and claimed her as a German prize. His act, however, was disavowed by the German Government, and the Governments of Germany, France, and Great Britain issued practically similar instructions to their naval officers not to interfere in any way with these vessels unless they should molest the merchant vessels of these countries, respectively, and then to seize them and turn them over to the Spanish Government.

The case of the insurgents in the late Brazilian insurrection was much similar to the case just mentioned. The case of the *Huascar* was different. The crew of the Peruvian ironclad *Huascar*, anchored at Callao, revolted on May 6, 1877, and declared for the insurgent government of Pierola, proceeding to sea without opposition from the other Peruvian vessels in the harbor. The titular Government of Peru issued a decree calling the crew of the *Huascar* rebels and authorizing her capture, and stating that the Peruvian Government would not be responsible for her acts. The *Huascar* stopped several British vessels, taking out of one of them two officers who were going to Peru, and also seized certain lighters of coal belonging to British subjects. The British admiral, being advised of these proceedings, sent two vessels of his force to sea to seize the *Huascar*. An engagement took place which was only partially successful, the *Huascar* escaping and subsequently surrendering to the Peruvian Government. The Peruvian Government claimed indemnity from Great Britain, but the law officers of the Crown, upon the question being referred to them, held that as the *Huascar* was sailing under no national flag, and was an irresponsible depredating cruiser, the conduct of the admiral should be sustained. This was a case where hostile acts were extended to the ships and citizens of third States.

As the established usage and the rules of international law are made by the accumulation of acts, instructions, and decisions, it will be of value and interest here to quote the instructions given to the officers of the British navy. The British admiralty instructions, in article 450, read as follows:

> Should any armed vessel not having a commission of war or letter of marque from a foreign de facto government commit piratical acts and outrages against the vessels and goods of Her Majesty's subjects, or of the subjects of any other foreign power in amity with Her Majesty, and should credible information be received thereof, such armed vessel is to be seized and detained by any of Her Majesty's ships falling in with her, and sent to the nearest British port where there is a court of competent jurisdiction for the trial of offenses committed on the high seas, together with the necessary witnesses to prove the act or acts, and with her master and crew in safe custody, in order that they may be dealt with according to law. In the case, however, of an attack by a ship in the possession of insurgents against their own domestic government, upon ships of war of that government, upon merchant ships belonging to its subjects, or upon its cities, forts, or people within the territorial limits of their own nation, Her Majesty's ships have no right to interfere except in the case mentioned in article 447, and in any such case the operations must be restricted to such acts as may be necessary to attain the precise object in view.

Article 447 refers to the offering of asylum and protection to British subjects afloat and ashore, and is given hereafter.

The general aspects of this question and the grounds of its solution are so well stated by Hall that we may fitly quote his words as a conclusion of the discussion. He says:

> Most acts which become piratical through being done without due authority are acts of war when done under the authority of a State; and as societies to which bel-

ligerent rights have been granted have equal rights with permanently established States for the purposes of war, it need scarcely be said that all such acts authorized by them are done under due authority. Whether the same can be said of acts done under the authority of politically organized societies which are not yet recognized as belligerent may appear more open to argument, though the conclusion can hardly be different. Such societies being unknown to international law, they have no power to give a legal character to acts of any kind. At first sight, consequently, acts of war done under their authority must seem to be at least technically piratical; but it is by the performance of such acts that independence is established and its existence proved. When done with a certain amount of success they justify the concession of belligerent privileges; when so done as to show that independence will be permanent they compel recognition as a State. It is impossible to pretend that acts which are done for the purpose of setting up a legal state of things, and which may in fact have already succeeded in setting it up, are piratical for want of an external recognition of their validity, when the grant of that recognition is properly dependent in the main upon the existence of such a condition of affairs as can only be produced by the very acts in question.

(*c*) *Slave trade is not piracy by the law of nations.*—The slave trade, though forbidden by the municipal law of all civilized nations and also declared by the municipal laws of Great Britain and the United States, as well as some other nations, to be piracy, is not such by the law of nations. The right of visitation and search of foreign vessels and their capture as slavers in time of peace exists only by special convention or treaty.

A French vessel, *Le Louis*, captured on the high seas in 1816, was carried to Sierra Leone and there condemned. The case was brought by appeal before Sir William Scott, who decided that the slave trade was not piracy according to international law. This learned judge held:

> In truth it wants some of the distinguishing features of that offense. It is not the act of freebooters, enemies of the human race, renouncing every country and ravaging every country in its coasts and vessels indiscriminately and thereby creating an universal terror and alarm, but of persons confining their transactions (reprehensible as they may be) to particular countries, without exciting the slightest apprehension in others.

Woolsey says:

> However much the slave trade may deserve to be ranked with piracy or ranked as a worse crime, still it is not yet such by the law of nations, and would not be if all the nations in Christendom constituted it piracy by their municipal codes, for the agreement of different States in the definitions and penalties of crimes by no means gives to any one of them the right to execute the laws of another.

The statesmen and jurists of the United States have always contended that the slave trade is not piracy *jure gentium*, and have agreed that as no nation can exercise police jurisdiction over private vessels of other nations on the high seas, except in war or for piracy, the right to detain and search vessels on the high seas does not exist as a means for the suppression of the slave trade. The reciprocal right of search within certain limits exists between the United States and Great Britain by the treaty of 1862. By this treaty this right shall be exercised reciprocally only within the distance of 200 miles from the coast of Africa and to the southward of the thirty-second parallel of north latitude and within 30 leagues from the coast of the Island of Cuba. Mixed courts of justice were to adjudicate cases, and were to reside, one at Sierra Leone, one at the Cape of Good Hope, and one at New York.

By an additional article the right of search was extended to within 30 leagues of the islands of Madagascar, Puerto Rico, and Santo Domingo, and by an additional convention in 1870 the mixed courts were discontinued and the jurisdiction transferred to the respective courts of the two countries.

CHAPTER IV.

INTERVENTION; NATIONALITY; INTERNATIONAL AGENTS OF A STATE; INTERNATIONAL FUNCTIONS OF NAVAL OFFICERS.

SECTION 28.—INTERVENTION.

The question of intervention by one State in the internal affairs of another State is given considerable space in the older works on international law, the grounds upon which this may be done being elaborately discussed.

At one time the matter of intervention was taken up so seriously as to result in the formation of "the Holy Alliance," a combination of several European States which agreed upon a policy to suppress all insurrectionary movements of peoples against their sovereigns. It was against this principle that the Monroe doctrine was promulgated in 1823.

Upon the pretended grounds of humanity and religion, frequent interventions have taken place in the past. Recent practice would seem to restrict the right of intervention to one case—that for the purpose of self-preservation or self-defense.

A State must be allowed, Hall says, to work out its internal changes in its own fashion so long as its struggles do not actually degenerate into internecine war. In such case, the whole body of civilized States might concur in authorizing intervention. But when it is not authorized by the civilized States, accustomed to act together for a common purpose, such intervention, whether armed or diplomatic, undertaken for the purpose of cruelty or oppression, or on account of the horrors of internal war, would have to be justified by the unquestionably extraordinary character of the facts causing the intervention, by the evident purity of the motives and conduct of the intervening State, and would have to rely for its ultimate justification upon the general judgment as to the sufficiency of the facts. In cases of this kind, intervention being for other purposes than self-preservation can not be considered as a right under the law of nations.

So far as the United States are concerned the policy and rule have been of nonintervention. The exceptions have never taken the form form of armed intervention, though tending in that direction during the period of Maximilian's rule in Mexico, and taking a somewhat tangible shape during the last war in South America between Chile and Peru. It has, however, often assumed the friendly offers of mediation and the less friendly form of intercession for political offenders, for Christian ministers abroad, and in behalf of persecuted Jews and native Christians in Russia, Turkey, and other countries.

SECTION 29.—NATIONALITY.

The questions: Who are citizens, on what conditions are persons admitted to citizenship, and on what conditions may citizens expatriate themselves, are questions of constitutional law which every

State determines for itself. The conflict, however, of the laws of the several States upon these subjects has brought about some of the most difficult problems of international law.

The migration of men and the duty of the State to protect its citizens cause constant friction. We have native born and naturalized citizens. In the words of Sir Alexander Cockburn:

> Nationality, or in other words the status of an individual as a subject or citizen in relation to a particular State, is either natural or acquired; natural when it results from birth; acquired when an individual is accepted as a subject or citizen by a State to which he did not originally belong. Nationality by birth or origin depends according to the law of some nations on the place of birth; according to that of others on the nationality of the parents without reference to the place of birth. In many countries both elements exist, one or the other predominating.

By the common law of England all persons born on English soil and no others were English subjects, and the United States inherited the same rule from England excepting as to children. Both countries have by statute enacted, with certain reservations, that children born abroad of citizens or subjects shall be held to be native born. Children born of diplomatic agents or on board ships of war were not included in this legislation on account of the exterritoriality of the place of their birth.

By the French law (Code Napoleon) all persons born of French parents, without reference to country, are French citizens; moreover, persons born in France of alien parents have at the age of twenty-one the right to elect to become French citizens or citizens of the country of the parents. Other European countries have adopted this French rule, with various modifications.

By the fourteenth amendment of the Constitution of the United States "all persons born or naturalized within the United States, and subject to the jurisdiction thereof, are citizens of the United States."

Under these conflicting laws a person born in England of French parents would be an English subject by English law, and a French citizen by French law.

If children are illegitimate, the nationality of their mother is their only possible root of nationality where national character is derived from personal and not from local origin. In the United States an American woman marrying a foreigner remains an American citizen, though a foreign woman marrying an American becomes herself American.

Section 30.—Naturalization and Expatriation.

Most countries have laws by which foreigners may be admitted to citizenship, but with reference to the right of expatriation or divesting oneself of nationality or origin there have been conflicting rules which have led to sharp dispute and even war. By the law of England, which was in force until 1870, no English subject could renounce his allegiance or cease to be an English subject without an act of Parliament granting him permission to do so. This principle has been termed indelible allegiance—once an Englishman always an Englishman. Thus a British subject who became naturalized in the United States was, by English law, still a British subject. This position of England was one of the causes which led to the war between England and the United States in 1812. The proclamation made by the Prince Regent in 1814, especially directed against America, after prohibiting natural-born subjects of His Majesty from serving under the United States, goes on to say:

And whereas it has been further represented to us that divers of our natural-born subjects as aforesaid have been induced to accept letters of naturalization, or certificates of citizenship from the said United States of America, vainly supposing that by such letters or certificates they are discharged from that duty and allegiance which, as our natural-born subjects, they owe to us, etc., * * * moreover, that all such, our subjects as aforesaid, who have voluntarily entered, or shall enter or voluntarily continue to serve on board of any such ships of war, or in the land forces of said United States, at enmity with us, are, and will be, guilty of high treason.

The United States protested against this proclamation and definition of treason and allegiance, yet, at the same time, in the opinion of Chancellor Kent, and by the rulings of the Federal courts, our laws as enforced were practically the same as those of England. The executive department of the United States, however, always took the other ground favoring expatriation, and by act of Congress passed in 1868 it was declared that the right of expatriation was a natural and inherent right of all people, and that any declaration, decision, etc., to the contrary was inconsistent with the fundamental principles of the Government of the United States, and that all naturalized citizens of the United States, while in foreign States, shall be entitled to and receive from this Government the same protection of person and property that is accorded to native-born citizens in like situation and circumstances. This act further states that where it shall be known to the President that any citizen of the United States has been unjustly deprived of his liberty by authority of any foreign government it shall be the duty of the President to demand the reasons, and if it appear wrongful, the release of such citizen, and if the release is unreasonably delayed, the President is to use such means, short of war, as he may think necessary to obtain such release.

In 1870 an act of Parliament was passed which provided for a choice and declaration of nationality on the part of a person born on British soil, but who became also at the time of his birth under the law of any foreign State, a subject of such State. This act also recognized the right of expatriation and naturalization on the part of a British subject, and thus disappeared the claim of indelible allegiance from the laws of Great Britain.

By French law, a citizen can lose the quality of a Frenchman by naturalization in a foreign country, but any person so naturalized can be punished by death if he bears arms against France. This latter condition and penalty with respect to bearing arms against one's former country also exists in the laws of Italy.

We have had disputes with nearly all of the European States with respect to naturalized American citizens; and this has been more especially the case since the army service has become so burdensome in those countries. Young men of the military age would procure American naturalization and then return to their native land and claim the protection afforded by their American nationality. The United States at first took the ground that no distinction should be made between naturalized and native-born Americans with respect to such protection abroad; but we have been obliged to compromise the matter or else declare war against all Europe.

By the terms of the treaty made in 1868 between the United States and the North German Confederation reciprocal naturalization conditions were adopted providing for an uninterrupted residence of five years in the United States for Germans claiming to be naturalized American citizens, and five years uninterrupted residence in Germany for Americans claiming to be German subjects. The declaration of an

intention to become a citizen is not to have for either State the effect of naturalization.

If, however, a German naturalized in America renews his residence in Germany without the intent to return to America he shall be held to have renounced his naturalization in the United States. The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country. In practice the German authorities, upon the expiration of the two years' residence give naturalized Americans an opportunity to return to the United States before forcing them to fulfil service in the German army.

With Turkey there have been various disputes arising from the naturalization of Armenian-Turkish subjects. The Turkish law of 1869 refuses recognition of the foreign naturalization of an Ottoman subject without the sanction and previous authorization of the Turkish Government. Every individual inhabiting Ottoman territory is reputed to be an Ottoman subject by the same law until his character as a foreigner is verified in a regular manner.

The Russian Government also declines to admit the right of another State to exempt by naturalization its subjects from their unfinished prior duties to their native land. In case of arrest under such circumstances the Russian Government generally at the request of the United States grants a release, but under conditions, and this is regarded as a concession from courtesy and not from right. We can not force our views concerning this or other matters upon foreign governments when their laws or their policy so strongly conflict with our own.

There is still another matter which has been a source of almost constant dispute with other countries, and that is as to the status of a foreigner who has declared his intention to become a citizen of the United States and who, though having a domicil in this country, is temporarily out of the jurisdiction of the United States. The case of Martin Koszta came under this head. Koszta was a Hungarian insurgent and refugee of 1848–49. Escaping to Turkey, he was there arrested and imprisoned, but released on condition of leaving the country. He came to the United States and made the usual declaration of intention to become a citizen. In 1853 he returned to Turkey and when in Smyrna he was seized by some persons in the employ of the Austrian consul and finally taken aboard the Austrian man-of-war *Hussar* for conveyance to Trieste. The United States *chargé d'affaires* at Constantinople requested the commanding officer of the United States man-of-war *St. Louis* to demand Koszta's release and if necessary to have recourse to force. The *St. Louis* went to Smyrna and Captain Ingraham informed the commander of the *Hussar* that unless Koszta was at once delivered to him, he should take him by force of arms.

As a conflict between the two ships of war would have been attended with great danger to the shipping and town, the French consul offered his mediation and Koszta was delivered to his care to be kept until the decision of the respective governments was ascertained. In the end the affair was settled by Austria assenting to Koszta's return to the United States, the right to proceed against him in case he returned to Turkey being reserved. Upon a request for reparation being made on the part of Austria, Secretary Marcy claimed: First, that Koszta had a right to renounce his Austrian allegiance and seek domicil elsewhere; second, that Koszta was not an Austrian subject according to Austrian decree,

as he had left Austria without permission, with intention never to return, and hence had lost all real and political rights at home; third, that Koszta though not naturalized and a citizen had acquired domicil in the United States, declaring his intention to become a citizen, and hence he was entitled to the protection of, and to be treated as, an American citizen. Mr. Marcy also claimed that it was a maxim of international law that domicil confers a national character. This position of Mr. Marcy, though questioned by Hall, is sustained by Calvo. By the instructions of the Department of State issued by Secretary Bayard in 1885, it is provided:

> Nothing herein contained is to be construed as in any way abridging the right of persons domiciled in the United States, but not naturalized therein, to maintain internationally their status of domicil and to claim protection from this Government in the maintenance of such status.[1]

In regard to the case of Simon Tousig, a native of Austria, who had acquired domicil in the United States, but not citizenship, the case was decided differently, upon the ground that Tousig had voluntarily returned to his native State and placed himself within the reach of her municipal laws, one of which he was charged with having offended.

Mr. Marcy decided that, as to his passport he was not entitled to it, not being either a native or naturalized citizen, and, furthermore, having gone by his free act under the jurisdiction of Austria, he had subjected himself to her municipal laws. In this way the case differed from that of Koszta, who was in the jurisdiction of a third State when arrested.

Mr. Marcy goes on to say:.

> Every nation, whenever its laws are violated by anyone owing obedience to them, whether he be a citizen or a stranger, has a right to inflict the penalties incurred upon the transgressor, if found within its jurisdiction.

When a person has lost one nationality, as it is possible for an Austrian to do, without having gained another elsewhere through want of time or intention, it may be not unwisely ruled that the character of his nationality can be ascertained by his place of domicil.

Aliens are entitled to protection, both as to life and property, in the same manner as citizens. The right to hold title to real estate is dependent upon the laws of the State in which the land is situated. Aliens are not liable, as a rule, to military service, but they can, if allowed, voluntarily enlist.[2] They can be called upon for service in the militia or local police to maintain social order, provided the duty is police and not political, and they can be called upon to take arms against an external enemy, if such enemy threatens the existence of social order, as in the case of an attack by savages or uncivilized peoples.

Aliens are subject to local allegiance whether the government is duly recognized or is only *de facto*. They are not exempt from taxation unless they are foreign diplomatic agents.

Aliens may be expelled or excluded from a country if the State should so direct. This right is one of the attributes of a sovereign State. It has been exercised at times by the United States, as in the passage of the alien act of 1798, in the exclusion of foreign paupers and criminals, of foreign contract laborers, and of Chinese immigrants.

[1] Persons of this class are, however, not entitled to United States passports under the laws of Congress.

[2] By an act of Congress of 1863, aliens who had made a declaration of intention to become citizens were made subject to the military draft, but were given time to leave the country if they chose.

SECTION 31.—PROTECTION OF CITIZENS IN FOREIGN COUNTRIES.

Hall says:

States possess the right to protect their subjects abroad, which is correlative to their responsibility in respect of injuries inflicted upon foreigners within their dominions; they have the right, that is to say, to exact reparation for maltreatment of their subjects (or citizens) by the administrative agents of a foreign government if no means of obtaining legal redress through the tribunals of the country exist, or if such means as exist have been exhausted in vain.

As we have seen, "all persons entering upon a foreign territory" submit themselves to the jurisdiction of that country; but, on the other hand, they are entitled, under the rules of international law, to the same protection that citizens receive, and they must pursue their remedies in the same way through the courts of law. No nation has affirmed this principle more strongly than the United States. The reason for this rule is that to give aliens special privileges would establish an unjustifiable inequality between citizens and aliens, and would conflict with the exclusive territorial jurisdiction of the State, a fundamental right of its existence.

The responsibility of a State results not from the mere fact of injury done to foreigners within its territory; but from its neglect or inability to redress the wrong, to control the conduct of its citizens, or to punish them for offenses which they commit against aliens.

In this last-named case it is the duty of the State whose citizens are injured in a foreign land to interfere in their behalf, and the method of interference will vary in accordance with the character of the State within whose territory the injury complained of takes place.

States, with respect to their character or institutions, may be divided into three general classes—(1) stable; (2) weak; (3) semi-civilized or barbarous.

In the case of States possessing stable institutions and whose courts are always ready to redress the injuries of individuals, all that is ordinarily done is to call the attention of the Government through diplomatic channels to any seeming failure of justice in respect to aliens; and if a dispute follows it is settled diplomatically or by war. Stable governments exist in nearly all the States of Europe, the United States, and perhaps some of the Latin-American States.

There is a peculiarity in the Constitution of the United States which calls for a passing notice, and that is the inability of the Federal Government to control the action of the governments and courts of the several States of the Union in respect to what is called the common-law rights of citizens. The Federal courts have no common-law jurisdiction in criminal cases, whether the question be with regard to citizens or aliens, so that when an alien is killed or criminally assaulted within a State the Federal courts have no jurisdiction to punish the offender; it must be left to the State courts. But the individual States of the Union have no existence as subjects of international law, and can not be reached except through the Federal Government, which is alone responsible toward other countries for the acts of the States in such matters. Thus we have an anomalous condition of things—the Government of the United States responsible to foreign governments for acts over which it has no control. A good illustration of this difficulty was shown at the trouble which arose concerning the assassination of Italians by a mob at New Orleans, which has already been referred to. The indemnity offered by the United States was for the reason that the Italian subjects murdered were in the custody of

the State authorities and from an international point of view in the custody of the United States and hence entitled to special protection, whereas the State and municipal authorities failed to protect them.

The case of the assault upon the seamen of the U. S. S. *Baltimore* made in Valparaiso in 1892 was peculiar. The attack was upon men wearing the uniform of the United States, and in the opinion of our Government the animus of it was directed against the United States rather than against the seamen as individuals; yet it may be questioned whether under international law these circumstances were sufficient to render the Government of Chile responsible for the outbreak.

Vattel says:

> It would be unjust to impute to the nation all the faults of its citizens. In general it can not be said that one has received an injury from a nation because some of its members have injured him.

The real question of international law involved in the case of the seamen of the *Baltimore* was, however, whether the Chilean Government took the proper measures to prevent the attack and in bringing the offenders to punishment. That was a question of fact which our Government had to decide for itself according to all the evidence in its possession, and it decided that the Government of Chile had not done all that it should have done to prevent the attack and to punish the offenders.

As to the second class of States—that is, weak States, or States whose internal sovereignty is unstable—foreigners must often be protected, not by diplomatic representation—there is then no time for that—but by the immediate employment of the naval forces of their own country.

There can hardly be said to be a fixed rule of international law upon this subject, it being exceptional in its nature, as international law presumes that all sovereign States are capable of enforcing their laws within their jurisdiction.

In this class of States, whenever civil commotions occur, it is usual for foreign nations to send ships of war to the scene of the disturbance for the protection of the lives and property of their citizens who may be residing there. In places where diplomatic agents are stationed they as a rule have instructions to confer with the senior naval officer as to the advisability of using the naval forces of their nation in critical cases. With respect to the United States, the diplomatic agents have no authority by law over the officers of the navy.

Lemoine says:

> In certain urgent cases, under the personal responsibility of the commander of a vessel of war, an intervention may take place in favor of his countrymen who are in imminent danger, and, indeed, such cases are not infrequent in certain places where public authority is not organized as in Europe.

He adds that great care should be taken before intervening on the demand of the persons supposed to be endangered who are, he thinks, usually inclined to exaggerate the facts.

Under the rules of some States it is customary for the diplomatic representative when present to assume the responsibility of deciding when the occasion for intervention arises; but even in this case the senior naval officer is to judge whether the military or naval measures are capable of execution, and he is to be responsible for the carrying out of such measures.

But in the practice of other States, even where they have permanent and trained consular and diplomatic representatives at the scene of the

disturbance, there is a tendency to place both the responsibility and the decision as to the use of naval or military measures upon the naval commander alone.

In the French code (Art. 138, *du décret sur le service à bord*) it is directed that the commanding officer shall, as much as possible, act in concert with the diplomatic agents or consular authorities of France; but the commanding officer alone remains the judge of the occasion or necessity for the use of his forces, and he is also the sole judge of the limits in which this action can be exercised.

In the admiralty instructions to British naval officers (Art. 438) it is stated:

> It being a general obligation on all Her Majesty's civil and military officers to afford mutual assistance to each other in cases affecting the Queen's service, the commander in chief of a station or the senior officer present at a port is to pay due regard to such requisitions as he may receive from any of Her Majesty's ministers, governors, or consular officers having for their object the protection of her possessions, the benefit of the trade of Her Majesty's subjects, or the general good of her service.

In case such requisitions conflict with his orders he is to decide as in his judgment seems best, but:

> He is always to bear in mind the grave responsibility that would rest on him if the circumstances were not such as to fully warrant the postponement of the instructions from his naval superior to the more pressing requisition from Her Majesty's civil servant.

Article 447 of the same instructions states:

> As a general rule protection to British subjects is to be limited to affording them asylum on board ship and to securing them by boats an escape from the shore when their departure may be a necessary precaution. Interposition by the landing of an armed force is only to be had recourse to when the lives or property of British subjects are actually in danger from violence which can not be otherwise controlled.

In the Navy Regulations of the United States (Arts. 284, 285, 286) it is provided that on occasions where injury to the United States or their citizens is committed or threatened the commander in chief or senior officer present shall consult with the diplomatic or consular representatives of the United States and take such steps as the gravity of the case demands. The responsibility for any action taken by a naval force, however, rests wholly upon the commanding officer thereof.

In no case is force to be used, except as an act of self-preservation, which is defined to include "the protection of the State, its honor, and its possessions, and the lives and property of its citizens against arbitrary violence, actual or impending, whereby the State or its citizens may suffer irreparable injury." Force is never to be exercised with a view to inflicting punishment for acts already committed.

In all cases where measures involving the use of force are once undertaken it can be readily seen that a failure to carry them out leaves matters in a worse condition for all concerned than if they had not been begun.

Very often the mere appearance of a naval force and a firm attitude on the part of the senior officer present will prevent the necessity of resorting to active measures. A display of force is sometimes ordered by Congress as well as by the Executive.

It happens at times that the commander of a vessel of war is requested to protect the citizens of other States than his own, and in uncivilized or weak communities or upon sudden emergencies this protection may be granted.

Instances of this kind have occurred of late years in the case of protection afforded by a British man-of-war to the inhabitants of Alaska at the time of a reported Indian uprising, by a British man-of-war again at the time of the shooting of American citizens and British subjects from the *Virginius* at Santiago de Cuba, and also by our own vessels on the Isthmus of Panama, at Samoa, and at Bluefields, in Nicaragua.

A somewhat interesting case of this kind happened in 1877 at Apia, Samoa. In that year American residents and some others revolted against the authority of the American consul at Apia and took possession of the consulate. There being no American man-of-war in the harbor at the time, the French man-of-war *Seiguelay*, commanded by Captain (afterwards Admiral) Aube, was called upon by the American consul for assistance and protection. Captain Aube complied with the request, landed a force, and restored the authority of the consul and secured to him the possession of the consulate, only requiring from the consul that he, as representative of the United States, should take the absolute responsibility of his acts and that he would act only against persons submitted to his jurisdiction.

The French admiral in command of the station on which the *Seiguelay* was serving disapproved of the action of its commander, but the French ministry at home sustained Captain Aube and approved his action.

During the negro insurrection on the Danish island of Santa Cruz, in the West Indies, in the same year (1877), the U. S. S. *Plymouth*, under the command of Captain (now Admiral) Harmony, was ordered to that place to protect American interests, and in the interests of humanity to look out for the defenseless white inhabitants of that island. This protection was afforded in turn by American, English, and French vessels of war, while the governor of the neighboring Spanish colony of Puerto Rico held a land force in readiness for embarkation for the same purpose. In this case an armed force was occasionally landed from the *Plymouth* by the request of the Danish authorities.

The British admiralty regulations provide for cases of this kind in the following terms:

> Applications for the protection of subjects of foreign powers in amity with Her Majesty may be entertained in case none of their ships of war are present; the application should, however, be made through Her Majesty's minister or consul, and it should only be acceded to when the protection does not interfere with the public service nor with the orders under which the naval officer is acting.

Though no regulation of this kind exists for the United States Navy, it can be considered as an established usage to extend similar protection under similar circumstances.

Citizens or subjects of one State merely entering into the military or naval service of a foreign country do not thereby lose their citizenship; but if they engage in warlike measures, or in an attack upon the Government in whose jurisdiction they reside, they forfeit claim to the protection of their own Government.

Pomeroy says:

> A practical difference may exist between the case of a foreigner domiciled in a country of which he is not a citizen and the case of a foreigner temporarily and transiently there. The former person may well be subjected to many claims from the State of his adoption which would be unwarrantable if demanded from the latter; thus, he might well be called upon to pay taxes, to do military service and the like.

The landing of troops for the protection of the transit route across the Isthmus of Panama, which is a duty assumed by the United States

under a treaty, would include the protection of all American and other citizens and their property when such persons are concerned directly or indirectly with this transit.

Cases may arise of anarchy, social disorder, or mob rule which would justify the use of force by foreign countries upon the request of the properly constituted local authorities.

With respect to semicivilized or barbarous countries, even where there is a recognized government, foreigners are by treaty largely exempted from local jurisdiction. In such countries the consuls of foreign States are clothed with extensive powers, and it is customary for ships of war to aid them in the protection of their own citizens, and at times those of other civilized States. Intervention in such countries is not so grave a question in relation to international law, for these countries have not the full rights of sovereign States. Countries under this head would include China, Korea, Siam, Muscat, Persia, Turkey, Morocco, some of the Pacific islands, and until recently Japan.

In these questions of protection to citizens the naval forces have come to be the principal means of upholding the authority of their respective States, and their aid is constantly called upon. But the diplomatic and consular agents of a State are also and primarily required to look to the safety and protection of citizens in foreign countries.

It will therefore be not inappropriate to examine at this point the character and functions of these officers.

SECTION 32.—INTERNATIONAL AGENTS OF A STATE.

The agent of a State in its international relations, within its own borders, is the person to whom the management of foreign affairs is committed. This person in the United States is the Secretary who is at the head of the Department of State, and who is known as the Secretary of State.

(*a*) *Diplomatic agents.*—The political relations of States are carried on abroad by diplomatic agents. These agents have been in existence since the beginning of nations, but it is only in modern times that the system of permanent embassies has been established; indeed the system was hardly recognized generally at an earlier date than the peace of Westphalia in 1648. Even after that date resident ambassadors were often looked upon with great disfavor and some sovereigns refused to receive them, regarding them as spies, which indeed they were in many cases.

In the older system of diplomacy ceremony was of much more importance than it is at present. The question of precedence in a congress of nations, or at courts, was of immense international consequence; months were spent in deciding questions of etiquette alone. In the case of the peace of Westphalia the preliminary questions, many of them of a merely ceremonial character, occupied several years. The congress of Berlin concluded the treaty of 1878 in less than a month from the date of its first meeting.

This question of precedence became so troublesome that the congress of Vienna in 1815 attempted to regulate it by dividing diplomatic agents into three classes, and at the congress of Aix la Chapelle, three years later, an additional class was created. This classification is:

(1) Ambassador, legate, etc., of the Pope; (2) minister plenipotentiary and envoy; (3) minister resident; (4) *chargé d'affaires.*

The first three classes are accredited to the sovereign or head of the State, the fourth class to the secretary for foreign affairs.

The theory formerly held was that an ambassador represented his sovereign personally, and had the right of treating with the foreign sovereign personally; but this right has lost its practical value under modern methods of government, and the classification of diplomatic agents is now of little more than ceremonial value. But even this value counts for something when a minister plenipotentiary must wait in the antechamber until all ambassadors have had their audience.

There is no absolute obligation to receive diplomatic agents, but the custom is now so deeply rooted in the practice of nations that a refusal would require very grave reasons for its justification, and would be looked upon as so unfriendly an act as to be little removed from hostility.

A State may refuse to receive an ambassador on special grounds; for instance, some Protestant States refuse to receive legates or nuncios of the Pope; a State is not generally willing to receive one of its own citizens as an ambassador of a foreign State; finally, a person appointed as diplomatic agent may be for various reasons or causes *persona non grata*. In some States it is usual to send the name of the proposed appointee to the Government of the State to which he is to be appointed in order that objections, if any exist, may be made before the appointment.

A diplomatic agent may also be dismissed if for any reason he become *persona non grata*.

It has been held by our Government in the case of Minister Egan, whose recall was demanded by Chile in 1892, that the grounds of objection must be communicated and must be such as to justify the demand. It has been said that the United States have the misfortune to supply almost all of the modern instances in which a government has felt itself unable to continue relations with a minister accredited to it, and it must be admitted that the list of cases is long, beginning with Gênet in 1793 and ending with the present year.

Diplomatic agents are furnished with letters of credence. This instrument is addressed by the sovereign or chief of state to the Sovereign or State to which he is sent. In the case of a *chargé d'affaires* it is addressed by one minister of foreign affairs to another. This letter of credence contains the general purport of the mission, the name and class of the agent, and a request that due faith be given to his representations, etc. He is also furnished with instructions from which he may not depart; and in the case of new questions arising additional instructions are sent. At rare times he is furnished with "full powers," in which case his State is bound by his acts. The subordinates of an ambassador or minister are generally known as secretaries of embassy, secretaries of legation, naval, military, and other attachés.

(*b*) *Consuls.*—The establishment of consulates is of much earlier date than that of resident embassies. The institution had its origin during the Crusades, which gradually brought about trade relations between the East and the ports of the western Mediterranean—such as Venice, Genoa, Marseilles, and Barcelona. At this time the States offered little guarantee for the security of life and property, and it behooved the merchants to protect themselves. They not only formed guilds, but it is probable that consuls were first appointed by associations of merchants. But the various States as they emerged from the chaos of feudalism assumed control of the consular system. Consuls at this time enjoyed the full privileges of exterritoriality and the immunities accorded at the present time to ambassadors. These are still retained to a large extent with Oriental nations.

Before the middle of the seventeenth century a great change had been effected in international intercourse and commerce. Sovereign States had taken the place of feudal barons, and the exterritorial jurisdiction of consuls was no longer needed or permitted. Moreover, permanent legations had been established and ambassadors assumed many of the functions formerly belonging to the consuls. As a result consuls settled into the position of general guardians of the shipping and navigation interests of their respective nations and of their citizens, which is in the main the position they now hold. It has been said that diplomatic agents represent their States and that consuls represent the individuals of the State.

Consuls are not furnished with credentials nor instructions, but with a commission to watch over the commercial rights and privileges of their nations, and before entering upon their duties they must receive a commission called an exequatur from the sovereign of the country to which they are sent, which may be revoked at any time. As a general rule, they are amenable to the civil and criminal jurisdiction of the country in which they reside. They have no claim to any foreign ceremonial or mark of respect on shore, and have no right of precedence except among themselves. But, either by custom or treaty, or both, they have the right to place the arms of their country over the door of their official residence and to hoist its flag over the consulate. As a matter of comity, they are usually exempt from personal taxes, from having soldiers quartered in their houses, and from jury duty, while the archives and official papers of the consulate are held to be inviolate.

Consuls, unlike diplomatic agents, may be, and often are, citizens of the country in which they reside, and may be engaged in business there, but the tendency is latterly to restrict them in this respect, so that now consuls-general and consuls of the first grade are not permitted by many States to engage in business.

Sometimes consuls-general are also clothed with diplomatic character, being both consul-general and *chargé d'affaires*. The United States has fourteen such consuls-general, who are for the most part residents in semicivilized countries. Some European governments refuse to receive persons clothed with these two characters.

Again, consuls or consuls-general in colonies distant from the mother country are often permitted to make diplomatic representations to the local government or authorities and to do other things which are usually performed by diplomatic agents. There are a number of cases of this kind, as in Australia, Hongkong, and Havana.

Consular courts existed in eastern countries during the earlier period of the Middle Ages; this matter now is generally regulated by treaty. Consular duties are described at length for our consuls in the official regulations issued by the Department of State by the authority and direction of the President for the use of the consular service.

The ordinary duties of a consul can be embraced under four general heads: First—Acts pertaining to vessels, to masters and seamen, or to passengers and emigrants; also acts relating to shipwreck, the apprehension of deserters, and the relief and return of seamen. Second—Acts relating to goods for export to the country he represents, such as authentication of invoices, granting of debenture certificates, etc. Third—Acts in behalf of the government which employs him, including commercial and hydrographic information collected, and reports as to matters of general or special importance occurring within or near his consular district. Fourth—Acts in behalf of the citizens of the country he represents who are abroad and within his district; these acts include

matters relating to deaths, notarial acts, administration of estates, and the charge of the effects of deceased citizens.

The consular service of the United States consists of agents and consuls-general, vice consuls-general, vice-consuls, deputy consuls, commercial agents, deputy commercial agents, consular agents, consular clerks, interpreters, marshals, and clerks at consulates.

The only agent and consul-general is at Cairo, Egypt. He enjoys a quasi-diplomatic position, so far as the Porte may consent thereto. The title of commercial agent is peculiar to the United States, but commercial agents are full, principal, and permanent consular officers, as distinguished from subordinates and substitutes, and are entitled to all the powers, immunities, and privileges that under public law or otherwise are accorded to the consular officers. Vice consuls-general, vice-consuls, and vice-commercial agents are substitutes who may temporarily fill the places of consuls-general, consuls, and commercial agents. They have no function or powers when the principal officer is present, but their powers are coextensive with those of their principal when they are acting in his place during his absence.

Deputy consuls-general, deputy consuls, and deputy commercial agents are consular officers subordinate to their principals and exercising and performing the duties within the limits of the respective offices at the same ports or places where their principals are located. They perform their functions whether their principal is absent or not; but they do not assume responsible charge of the office, that being the duty of the vice-consular officer.

Consular agents are consular officers, also subordinate to their principals, exercising their powers and performing their duties within the limits of the several consulates, but at ports or places different from those at which the principals are located. They act only as representatives of the principal and are subject and subordinate to him.

Conventions and treaties concerning consular privileges and functions exist between most of the civilized and semicivilized countries of the world and the United States. The parts applying to consuls are to be found in Appendix No. 1 of the Consular Regulations. Great Britain has no consular conventions defining privileges, etc., to any extent on account of the obstacles which her municipal laws place in the way of accomplishing this object.

The Navy Regulations of the United States provide for the visits, honors, and salutes to be accorded the diplomatic and consular officers of the United States and foreign countries. No relative rank is given between officers of the Navy of the United States and the diplomatic and consular service except so far as can be construed from the nature of the salutes or the precedence of visits.

In the British service, consular officers have the following rank and precedence as compared with naval officers: Agents and consuls-general rank with but after rear admirals; consuls-general with but after commodores; consuls with but after captains of the navy of three years standing; vice-consuls with but after lieutenants of the navy of eight years standing; consular agents with but after other lieutenants of the navy.

The official relations between the consular and naval officers of Great Britain are prescribed in the admiralty regulations and have been partly mentioned in the preceding pages.

It is provided further that as a general rule all communications with the local authorities or with the foreign consuls at a foreign port shall be made through the British diplomatic or consular authorities on the

spot, and any remonstrance addressed to the civil authorities can be the duty of a naval officer only in the absence of the British resident or consul, and in such a case it is to be made by the senior officer. British consuls are not authorized to call upon naval officers to assist them in enforcing the civil powers of a consular court.

The French regulations prescribe that the commanding officer of a vessel of war upon arrival in a foreign port should have recourse to the diplomatic or consular authorities of France in order to obtain all information which would apply to the duty with which he is charged or that would apply in general to the service of his State. He is to act generally in concert with the diplomatic and consular authorities of his State.

Consular officers of the United States, with those of other Christian countries, enjoy exceptional and exclusive judicial powers in China, Korea, Japan (until the treaty of 1895 shall be in full operation), Siam, Borneo, Madagascar, Muscat, and Morocco. Consular agents are not deemed to be judicial officers within the intent of the statutes of the United States.

In addition to the above countries, consuls and commercial agents of the United States at islands or countries not inhabited by any civilized people or recognized by any treaty with the United States are also invested by law with certain civil and criminal jurisdiction. In some of these countries there are mixed courts provided for certain cases between subjects of the semicivilized powers and American citizens.

The jurisdiction of consular courts is to be exercised in conformity, first, with the laws of the United States; second, with the common law, including equity and admiralty; third, with decrees and regulations having the force of law, made by the ministers of the United States in each country respectively, to supply defects and deficiencies in the laws of the United States or the common law as above defined.

The ministers of the United States accredited to the countries in which exist consular courts have certain supervision over consular courts. They themselves at times act as judges, and are also judges to whom appeals from consular courts can be taken in certain cases. In cases of sufficient magnitude appeal can be taken from the decisions of the United States consular courts and ministers in China and Japan to the circuit court of the United States for the district of California.[1]

(*c*) *Naval officers.*—Officers of the Navy, both in time of peace and in time of war, are frequently called upon to act as agents of their country, both ashore and afloat. As their functions in this behalf are independent of or concurrent with those of the diplomatic agents of the United States, they are frequently called upon to act with responsibility in cases of grave importance; and furthermore, as they are the only permanent body of officials of the Government of the United States who act as international agents, it is of importance that they should be well versed in the usage and law of nations.

The Regulations for the United States Navy require explicitly that they should, in their relations with foreign States and with the governments or agents thereof, observe and obey the law of nations.

Upon the arrival of men-of-war in foreign ports the salutes, visits, and other ceremonials toward the port and its authorities are prescribed in full detail by the Naval Regulations, and the honors that are required to be given to the President of the United States and to the civil, military, and naval officials of our country are to be extended in the same degree to foreign rulers and officials.

[1] See U. S. Rev. Stat., secs. 4091–4096.

It is expressly enjoined upon the senior naval officer present to impress upon the officers and men under his command in a foreign port that it is their duty to avoid all causes of offense to the authorities or inhabitants; that due deference must be shown to local laws, customs, ceremonies, and regulations; that in all dealings with foreigners moderation and courtesy should be displayed, and in general a feeling of good will and mutual respect cultivated.

No salute, however, is to be fired in honor of any nation or of any official of any nation not formally recognized by the United States.

All possible assistance in cases of distress is to be afforded by naval officers to vessels of our own and foreign States at peace with the United States. If similar assistance, in time of need, be refused to any vessel of the United States by foreign naval ships or officials, the matter must be reported to the Navy Department.

During war between civilized nations with whom the United States are at peace all naval officers are required to observe the laws of neutrality and to respect lawful blockades; but they are enjoined at the same time to make every possible effort that is consistent with the rules of international law to preserve the lives and property of citizens of the United States wherever situated.

On the high seas and wherever there is no diplomatic or consular officer of the United States at a foreign port, the senior naval officer is to exercise the powers of a consul in relation to mariners of the United States. He is also to communicate or remonstrate with foreign civil authorities as may be necessary, and to urge upon our citizens the necessity of abstaining from participation in political controversies or violations of the laws of neutrality. This authority to discharge certain consular functions does not give him power, however, to perform the general administrative and notarial acts of a consul toward citizens.

Great care is required to be observed by naval officers to respect the territorial authority of foreign civilized nations in amity with the United States. No armed force or large bodies of men are to be landed for any purpose on foreign soil without permission of the local authorities, except where necessary to prevent injury to the United States or for the protection of the lives or property of Americans. Even in these cases, if it be possible, the assent of the local authorities should be obtained.

Naval officers are directed to protect all merchant vessels carrying the American flag when engaged in lawful occupations, and they are expected to advance the commercial interests of their country, always acting in accordance with the rules of international law and in accordance with existing treaty obligations.

It is forbidden to allow any vessel of war of the United States to be searched by any person representing a foreign State, or to allow any of the officers or crew to be taken out of her so long as there is power to resist. If force is used it must be repelled.

As the boats of a ship of war are regarded in all matters concerning the rights, privileges, and comity of nations as parts of the vessel herself, it is required that, in ports where hostilities exist, or are threatened, boats away from the ship should be in charge of some proper person, and that their national character should be plainly evident.

The assemblage of a court-martial in any place subject to foreign jurisdiction is also forbidden. The proceedings of a court-martial or any similar body instituted in contravention of this rule would be wholly invalid.

Chapter V.

Amicable Settlement of Disputes; Measures Short of War.

Section 33.—Treaties.

Treaties are not international law, for they bind only the contracting States; but they generally show the tendency of the coming changes in that law. As soon as the change is accomplished there is no longer need of treaty stipulations.

As contracts between nations, treaties are subject to a certain extent to the rules of international law. Perhaps the most important question in relation to treaties is that of the binding effect of their obligations when the treaty is once made. Unlike private contracts, treaties are not, of course, subject to enforcement by an authoritative tribunal, but, therefore, there is all the more reason that the moral duty of the fulfillment of treaties should be strictly observed.

So far as the United States are concerned, some of our gravest international controversies have been caused with reference to treaties, both in respect to their interpretation and the obligations that exist and arise under them. The treaties of 1783 and 1818 and the Clayton-Bulwer treaty are instances of this kind.

International agreements are sometimes rather arbitrarily divided into two classes—treaties and conventions. Treaties, as a rule, are agreements of a general nature bearing upon political or commercial subjects, while the word "convention" is used for those of minor importance or relating to specific subjects. Such are consular conventions, postal conventions, etc.

At times agreements take the form of declarations and protocols. The declarations of Paris and St. Petersburg are among the former, the first being the well-known declaration as to maritime war and privateering, the latter as to explosive bullets, etc. The protocol concluded in 1874 giving foreigners the right to hold real estate in the Ottoman Empire is an example of the latter form. Generally speaking, a protocol is the official minute of the sessions held during the process of negotiating a treaty, duly drawn up, with the conclusions agreed upon, and signed at the end of each session by the negotiators.

The right to negotiate treaties is one of the fundamental attributes of national sovereignty. In a monarchy the treaty-making power is in the hands of the sovereign, with more or less restriction; in a republic, in the hands of the chief executive, assisted by his ministers or some assembly of the State. In the United States, for example, the President can only conclude treaties by the advice and consent of the Senate expressed by a two-thirds vote. As Commander in Chief of the Army and Navy, however, the President can alone, in the exercise of his military powers, conclude an armistice or arrange a convention with an enemy.

A sovereign must, of course, be actually in power to be able to negotiate treaties, as then only he represents the State with its inherent capacity for treaty making and treaty fulfilment. It is rare, however, that sovereigns treat directly or even sign treaties; such acts are delegated to their ministers or to special diplomatic agents.

After the negotiation of the treaty comes the act of ratification which transfers the matter from the hands of the agent of the government to the supreme authority of the State and gives to that authority the duty of assuming the execution of the treaty.

The right of ratification appertains in a monarchy to the sovereign, either alone or assisted by national representatives, and in a republic to the chief of the executive power with the consent, direct or indirect, of one of the grand powers of the State. This ratification should be full and without reservation or conditions.

A treaty is not binding until it is ratified by the proper authorities of each contracting State, the right to refuse ratification being as incontestable as the right to negotiate treaties. Unless otherwise specified, however, the treaty becomes operative from and at the date of its signature, and not from the date of its ratification.

A treaty duly signed and ratified becomes at once obligatory upon the signatory States, but notwithstanding this, often requires still other procedure before being put fully in operation. It may require some legislation, an appropriation of money, or changes in the revenue or other laws upon the statute books. With us this requires the action of the House of Representatives in addition to that of the Senate.

In regard to a possible refusal of this legislative action, Calvo says that without doubt the political power to which the constitution of each State assigns this duty is in principle free and independent in the exercise of its right; but international comity and proper regard for the supreme authority of the nation imposes upon the legislature the obligation to deliberately and gravely consider the matter, and, if possible, not to refuse its approbation and agreement, but to neglect the questions of mere form and detail, and to occupy itself only with the large and general interests of the nation.

The Constitution of the United States, in Article VI, provides that all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and that the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Unless a treaty is a secret one it is the usage to make it public for the information of the citizens or subjects of a State by means of a public proclamation. Then if no legislation is necessary to make it operative it will be executed by the judicial tribunals of the countries concerned, though in its public relations, as mentioned before, the treaty is binding from the date of its signature.

Treaties cease to be obligatory and are abrogated from various causes, such as the completion of the obligations therein provided for, by the expiration of the period for which the treaty has been concluded unless a renewal has been made, by mutual consent, by the withdrawal of either party when the treaty itself provides for its termination in this manner, by the entire attainment of the particular object for which the treaty was made, when the fulfillment of the treaty becomes morally or physically impossible, by loss of independence on the part of one of the contracting States, by a change of régime or government when the treaty expressly states that it depends upon such régime or government, by the necessities of self-preservation, and finally, by a declara-

tion of war, which suspends, when it does not destroy, treaty obligations between the two States. In regard to the above causes there can be little dispute, except that of self-preservation if it include self-development. Hall says:

> A treaty therefore becomes voidable so soon as it is dangerous to the life or incompatible with the independence of a State, provided that its injurious effects were not intended by the two contracting parties at the time of its conclusion.

Bluntschli goes much further, and holds the opinion that when a treaty becomes a permanent obstacle to the development of the constitution or the rights of a people it can be abrogated by that State; and also when the condition of things which have been the expressed or tacit base of the treaty is so modified by time that the sense of the treaty is lost or that its execution has become contrary to the nature of things, the obligation to respect the treaty ceases.

Pomeroy quotes Pinheiro-Ferreira as saying in a note to Martens as follows:

> I speak of those treaties which governments sometimes make with the clause that they shall remain binding forever, or at least until both contracting parties agree to rescind or modify them. Such conventions never have been, nor should they be, taken literally, for it would be absurd to suppose that the present generation could have the right to bind future generations by conventions, good or bad at the time of the inception, that the posterity of one contracting party ought to be sacrificed to the posterity of the other. Treaties bind nations only so long as the principle upon which their validity rests continues to exist—that is, until from the exact and conscientious accomplishment of the obligations which the compact imposes upon each party there can arise no damage which one party can not prevent or against which the other can not be indemnified. * * * Whenever, therefore, two States are placed in the situation which would have justified the recision of a contract between private persons, the obligations resulting from their treaty have ceased to exist.

As to the abrogation by war, it is evident that in case of war between two States such agreements previously existing between them as treaties of alliance, of amity and succor, of commerce and navigation, in a word, all treaty stipulations referring only to pacific relations, cease during hostile relations. It is not necessary to wait the positive declaration of war for this abrogation; the moment the relations become hostile these treaties cease to have effect. In the quasi-war between the United States and France in 1798 and 1799 all treaties were considered as abrogated.

There are treaties of another nature, such as those which concern frontier boundaries, the occupation of property, public debts, etc., which are permanent in their character, and during hostilities are suspended only, reviving at the termination of the war.

Those treaties, or parts of treaties, which, however, relate to maritime and land warfare, are not altered or abrogated by hostilities between the contracting parties. These treaties can only be annulled by new treaties or in the manner prescribed by the treaties themselves.

SECTION 34.—ARBITRATION AND MEDIATION.

When disputes of States lead to war, an entirely new set of international relations is brought into play. But before arriving at that stage, there may be amicable settlement of disputes by means of mediation and arbitration.

To settle international disputes arbitration is being resorted to more and more, and it is looked upon by those who would bring the world into a state of perpetual peace as the means of preventing wars. It seems to be assured that in certain kinds of disputes it will come into

general use, and perhaps, indeed, often prevent war. Arbitration has been resorted to by the United States upon several occasions, and has been of great use in settling grave and complicated differences with other countries, notably the Alabama claims and the questions arising in connection with the Bering Sea. Certainly, as Halleck says:

The precepts of morality, as well as the principles of public law, by which human society is governed, render it obligatory upon a State before resorting to arms to try every pacific mode of settling its disputes with others, whether such disputes arise from rights denied or injuries received. This moderation is the more necessary as it not infrequently happens that what is first looked upon as an injury or an insult is found upon a more deliberate examination to be a mistake, rather than an act of malice, or one designed to give offense. Moreover, the injury may result from the acts of inferior persons which may not receive the approbation of their own government.

Arbitration must be made under all circumstances voluntary and not obligatory. As Prof. Montague Bernard says:

Arbitration is an expedient of the highest value for terminating international controversies; but it is not applicable to all cases or under all circumstances, and the cases and circumstances to which it is not applicable do not admit of precise definition. Arbitration, therefore, must of necessity be voluntary; and though it may sometimes be a moral duty to resort to it, can not be commanded in any form by what is called the positive law of nations.

Phillimore says:

It can not be laid down as a general and unqualified proposition that it is the duty of States to adopt this mode of trial. There may, under the circumstances, be no third State willing or qualified in all respects for so arduous and invidious a task. Moreover, a State may feel that the contested right is one of vital importance, and one which she is not justified in submitting to the decision of any arbiter or arbiters.

In the International American Congress which met in Washington in 1889 certain recommendations with respect to arbitration were adopted with the consent of all the States except Chile and Mexico. These recommendations provide for arbitration under all circumstances except the questions are such as, in the judgment of any one of the States involved in the controversy, may imperil its independence.

In the question of the northeastern boundary of the United States, which was referred under the treaty of Ghent to the arbitration of the King of the Netherlands, the United States felt called upon to reject the award made by this arbiter.

As to the Geneva award, it may also be said that, notwithstanding the gratification afforded by the decision of the tribunal in this country, so prominent a writer as Hall says:

It is unfortunate that both the proceedings and the issue in the most important case of arbitration that has yet occurred were little calculated to enlarge the area within which confidence in the results of arbitration can be felt.

Sir Henry Maine also says:

The Geneva arbitration, I repeat, conferred great benefit for the moment on Great Britain and the United States. But, looked at as a precedent likely to exercise serious influence on the whole law of nations, I fear it was dangerous, as well as reactionary and retrogressive.

Sheldon Amos, in speaking of the universal adoption of arbitration, says:

The difficulty may be expressed by saying that arbitration seems to be the only means of perfecting relations of order, equity, and mutual confidence between States; the preëxistence, however, of which very relations must be treated as a condition precedent to the universal application of arbitration.

Can we regard the question behind it all as settled? Whether it would be desirable to do away with wars entirely? Are there not

occasions when wars are beneficial to the world, when progress could be made in no other way?

Notwithstanding the fearful evils of war and the debts and burdens of all kinds that follow in its train, the great epoch-making wars like that which gave us our independence, the wars of the French Revolution, the war for the Union, the Franco-German war, and the Russo-Turkish war created results that could hardly have been brought about in any other way.

Mediation in the shape of an offer of good offices may, of course, be offered before or during a war by a third State. It may come at the request of the disputing States, or as a result of existing engagement.

Mediation is essentially different from arbitration, as its office is that of reconciliation and moderation rather than of judgment and legal settlement. As Halleck says:

> The task is a very delicate one, and the office of mediator requires great integrity and strict impartiality, for unless he possess these qualities in a preëminent degree his efforts will not be likely to bring about the desired reconciliation of the disputants.

SECTION 35.—REPRISALS.

Formerly when an individual suffered injuries from a foreign State he was frequently given a letter of reprisal against the State. One of the last instances of this kind occurred in 1778, and was as follows:

The Government of England having seized several French vessels upon the ground that they carried contraband of war, the King of France, in view of this action, granted authority to the owners of these vessels to seize merchandise, effects, and goods found on land or sea and belonging to English subjects, and they were further permitted to arm vessels for such purpose. Such reprisals are no longer used, although permitted by laws still upon the statute books.

Reprisals can only be made by the central authority of a nation which has the power of making war. This does not, of course, refer to action which may be required toward peoples who are savage or uncivilized. Circumstances may render it urgently necessary upon the part of a naval commander to act upon his own responsibility in cases of this kind toward peoples from whom redress can not be obtained in any other way. International law, however, does not apply to communities of this kind, though justice and humanity are none the less obligatory in dealings with them.

Hall says in regard to reprisals:

> They are resorted to when a specific wrong has been committed, and they consist in the seizure and confiscation of property belonging to the offending State or its subjects by way of compensation in value for the wrong, or in seizure of property, or acts of violence directed against individuals with the object of compelling the State to grant redress, or finally, in the suspension of the operation of treaties. When reprisals are not directed against property they usually, though not necessarily, are of identical nature or analogous to the act by which they have been provoked. * * * Such measures as those mentioned are *prima facie* acts of war; and that they can be done consistently with the maintenance of peace must be accounted for, as in the case of like acts done in pursuance of the right of self-preservation, by exceptional reasons. * * * As a rule, the acts for which reprisals are made, except when reprisals are used as a mere introduction to war, are of comparative unimportance. It is this which justifies their employment. They are supposed to be used when an injury has been done, in the commission of which a State can not be expected to acquiesce, for which it can not get redress by purely amicable means and which is scarcely of sufficient magnitude to be a motive of immediate war. A means of putting stress, by something short of war, upon a wrongdoing State is required, and reprisals are not only milder than war, since they are not complete war, but are capable of being limited to such acts only as are the best for enforcing redress under the circumstances of the particular case. It of course remains true

that reprisals are acts of war in fact, though not in intention, and that, as in the parallel instances of intervention and of acts prompted by self-preservation, the State affected determines for itself whether the relation of war is set up by them or not.

Among the reasons given for reprisals are: A refusal to pay debts formally acknowledged; a suspension, without reason, of a treaty obligation; a refusal of reparation for injury or a denial of evident justice; a refusal to pay a just indemnity for losses caused by the fault of the offending State, when its responsibility is plain; a seizure of persons or property of the wronged State, and cruel and unjust treatment of citizens domiciled in a foreign State.

Halleck says:

It is only in cases where justice has been plainly denied, or most unreasonably delayed, that a sovereign State can be justified in authorizing reprisals upon the property of another nation. Moreover, the delay must be of such a character as to render it tantamount to a denial of justice. Thus, if the claim be a national one, it must be properly demanded and the demand refused. If it be of an individual, the claimant must first exhaust the legal remedies in the tribunals of the State from which the claim is due, and after an absolute denial of justice by such tribunals, his own government must make the demand of the sovereign authorities of the offending nation. Although the presumption of law is clearly in favor of the decisions of the lawfully constituted tribunals of a State, yet, if it is plain that justice has been administered partially, and in a different manner to the foreigner than to the subject, the government of the injured party may, notwithstanding such decision, demand justice, and if it be refused, resort to reprisals.

It is seen from the above that reprisals may be demanded for injuries to private citizens as well as for injuries done to the State, while reprisals may be exercised upon the persons as well as the property of the offending State or its citizens.

The following acts of reprisal without any declaration or existence of war may be regarded as having the sanction of usage and sufficient authority:

(1) The sequestration or seizure of property belonging to the offending State; (2) the sequestration or seizure of property of citizens or subjects of the offending State; (3) the partial or complete suspension of commercial and other intercourse between the two nations; (4) suspension or annulment of treaties in part or in whole; (5) withdrawal of all privileges and rights to domiciled citizens of the offending State; (6) a pacific blockade.

(1) The sequestration or seizure of property of the offending State has been more than once threatened. This method of reprisal was actually enforced in the celebrated incident known as the Don Pacifico case, when the naval force of Great Britain in the Mediterranean in 1849 enforced an embargo upon Greek shipping and seized several Greek ships of war in the Piræus.

The seizure or occupation of the island of San Juan in 1859 by the United States, although mentioned as a case of this kind, stands somewhat apart, as the United States claimed the island as a part of its own territory.

In 1855 Secretary Marcy wrote to the minister of the United States in China:

The Chinese Government, having persistently refused to pay a claim for personal injuries to a citizen of the United States, which it admitted to be due, the United States minister at China was instructed, at his discretion, to resort to the measure of withholding duties to the amount thereof.

(2) The seizure of private property belonging to citizens of the offending State was done in the past by letters of marque and reprisal. In more recent times the seizure of such property has been made by

national vessels, as the seizure of Neapolitan vessels by British men-of-war in 1840, the capture of Brazilian merchant vessels by England off Rio in 1861, and the seizure of vessels by Germany in Port au Prince in 1872. A hostile embargo is practically under this head, being a seizure of vessels of a foreign State in the ports of the wronged State awaiting further events.

(3) The suspension of intercourse had a very practical exemplification in our own history in the years preceding the second war with Great Britain. In 1807, after the attack on the *Chesapeake*, the President of the United States issued a proclamation excluding British vessels of war from the harbors of the United States.

In 1808 the Committee of the House of Representatives on Foreign Affairs reported in favor of the prohibition of admission of vessels of Great Britain and France. This was followed by the passage of the nonintercourse act, in 1809, which prohibited all commercial relations with Great Britain and France. In 1870 the President of the United States asked for power to suspend the laws authorizing the transit of merchandise across the territory of the United States to Canada, and further, if necessary, to forbid vessels of the Dominion of Canada from entering the waters of the United States. This was on account of the action of the Canadians toward our fishermen.

An embargo may be considered to come under this head if it is what is known as a civil embargo. By this is meant the act of a State detaining the ships of its own citizens in port, which amounts to an interdiction of commerce, accompanied, as it generally is, by a closing of its ports to foreign vessels. A hostile embargo is a seizure, as before mentioned, of foreign vessels and property which may be in the ports of the wronged State. This may also be a prelude to war.

(4) In 1798 Congress passed an act annulling all of the treaties with France, which was followed almost immediately afterwards by an act which, without formal declaration of war, authorized the President of the United States to seize by our armed vessels, public or private, any armed vessel of France, and to have these vessels brought into the ports of the United States, duly proceeded against, and condemned as lawful prize.

(5) Of aliens Halleck says:

> It is proper to remark that all subjects of the injuring Government are liable to reprisals whether they be natural, naturalized, or domiciled; but travelers and passing guests are in general excepted from such liability.

Hence all rights and privileges can be withdrawn and withheld from citizens or subjects of the offending State domiciled in the territory of the offended State.

A pacific blockade will be treated separately further on.

SECTION 36.—RETORSION.

Retorsion is retaliation in kind. If a nation has failed in courtesy, friendship, or good offices, if it has placed discriminating duties or restrictions upon commercial or other intercourse, or if it has in any way given just reasons for offense and no redress is offered or given, then the injured State has the right to take a similar course on its own part in order to bring back the other State to a sense of propriety and justice.

Woolsey says: "The sphere of retorsion ought to be confined within the imperfect rights or moral claims of an opposite party. Rights ought not to be violated because another nation has violated them." This is a little vague. Retorsion in peace and retaliation in war have had a

wholesome effect in times past, and have been the effective means of preventing unjust discrimination and violent excess.

Major G. B. Davis, U. S. A., says of retorsion that "the field within which the principle of retorsion may be applied, already very extensive, is certainly increasing." This state of affairs is due to the fact that the commercial relations of States are increasing in intricacy in direct proportion as they increase in extent and amount, giving rise to frequent conflicts between the business or internal policy of particular States and their external or international policy. Illustrations of this tendency are to be found in the experience of States which derive a large portion of their public revenue from customs duties. If some article of native production falls in price on account of foreign competition, an attempt is made to remedy this difficulty by increasing the duty upon the corresponding foreign article. This is felt at once in the State in which the particular article is produced or manufactured, and retaliatory measures are resorted to with the view of compelling the removal of the trade restriction. Recent relations between the United States and Germany afford illustrations of retorsion, either direct or in a veiled form.

SECTION 37.—PACIFIC BLOCKADE.

What is known as a pacific blockade, carried out in various ways, is a growing means of coercion short of war. It has been instituted, sometimes by joint action of several powers, sometimes by a single power, in some cases against all vessels, in others against vessels of the nations concerned only, and in still others against property and cargo only of the offending nation. The penalties have generally been seizure and confiscation, or seizure and detention.

Notwithstanding the opposition of some writers upon international law, the practice, as before said, is a growing one, and seems fairly well established. Heffter, Hall, Calvo, and Cauchy are of the modern writers who favor it. Bluntschli approves of the practice on condition that the blockade shall be so conducted as not to touch third States. Von Bulmerincq admits it as being at all events a less evil than war.

Walker speaks of it at length, as follows:

> Prior to 1827, blockade was held a pure war right, and it may be questioned whether in its wider extension pacific blockade must not justify itself rather as a mode of warfare limited in operation than as a means of redress falling short of war. For the operation of such a measure may extend either to the subjects of the blockading and blockaded powers only, or to the vessels of all nations. If it be confined to the subjects of the parties directly engaged its legitimacy can hardly be a matter for serious consideration. The less is justified in the greater and the blockaded sovereign has it in his power either to free himself from the inconvenience by the grant of redress or to resent it by the declaration of war.
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> If, however, the trade of neutrals be affected by the blockade, those neutrals may well protest against interference with their traffic not fully and completely justifiable. For them such protest must be a matter of policy. Pacific blockade may be, and doubtless is, the less of two evils; to refuse to recognize it may be to force the offended State to legalize its acts by instituting a regular blockade as a measure of war. * * *
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> Blockading powers would do well to announce to the worltd he exact international position which they affect to assume. In the instance of the combined blockade established by Great Britain and Germany on the African east coast for the prevention of the slave traffic and the stoppage of the importation of arms, Lord Salisbury conceived himself to have secured by negotiation with France the recognition of the long-contested right of search under any flag whatsoever, while M. Goblet declared that the French ministry had done no more than to recognize in the circumstances of the existing blockade such a condition of affairs as governed the French blockade of the coast of Annam in 1883. Great Britain, it is very certain, did not deem herself

to be engaged in a war upon her own African coast; yet the French foreign minister held that the right to search for contraband of war was in international law a natural consequence of her operations.

The first instance of pacific blockade occurred in 1827, when the coasts of Greece were blockaded by the English, French, and Russian squadrons, Greece being then nominally subject to Turkey and the powers were professedly at peace with Turkey. The Tagus was blockaded by France in 1831, New Granada by England in 1866, Mexico by France in 1838, the La Plata by France from 1838 to 1840, and from 1845 to 1848 by France and England; the Greek ports by England in 1850; the coast of Formosa by France in 1884; the coast of Greece by Great Britain, Germany, Austria, Italy, and Russia in 1886; and the coast of Siam by France in 1893.

The blockade of Formosa in 1884 by the French was intended to include neutral vessels as liable to capture and condemnation, notwithstanding that the French Government did not assume the position of a belligerent. The peculiar position it took was due, it is generally considered, to the fact that it was desired to have entire freedom in coaling at Hongkong, which it would lose if it assumed the name as well as the powers of a belligerent. The British Government refused to admit that under these circumstances the French Government had the right in international law to capture and condemn the vessels of neutral nations.

The Greek blockade of 1886 was for the purpose of coercing Greece into abstaining from hostilities which might precipitate a general European war. She had declined to be influenced by advice or threats, and it was not until the blockade gave tangible evidence that the majority of the great European powers were in earnest that Greece submitted. Hall says:

> The instructions given to the British admiral were to detain every ship under the Greek flag coming out from or entering any of the blockaded ports or harbors or communicating with any ports within the limit blockaded. "Should any parts of the cargo on board of such ships belong to any subject or citizen of any foreign power other than Greece and other than Austria, Germany, Italy, and Russia, and should the same have been shipped before notification of the blockade or after such notification, but under a charter made before the notification, such ship or vessel shall not be detained. The officer who boards will enter in the log of any ship allowed to proceed the fact of her having been visited and allowed to proceed; also date and at what place such visit occurred. * * * In case of detention steps must be adopted as far as practicable to insure safety of ship and cargo." (Parl. Papers, Greece No. 4, 1886.)
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> Incidentally some occurrences took place which must have been beyond the intended action of the powers. For example, at Skiathos part of the Austrian squadron made requisitions of provisions on the island, carrying off so much flour as to exhaust the stock; it also cut telegraphic communication and seized fishing boats.

In 1887 the *Institut de Droit International* adopted a declaration as to pacific blockades, which stated that the establishment of a blockade without a state of war ought to be considered permissible by the laws of nations only under the conditions that vessels of foreign flags can enter freely notwithstanding the blockade; that the pacific blockade be formally declared and notified and maintained by sufficient force, and that the vessels of the blockaded nation which do not respect the blockade can be sequestered; but that when the blockade ceases these vessels and their cargoes should be restored to their owners, but without compensation.

SECTION. 38.—INTERNATIONAL MOVEMENTS FOR THE MITIGATION OF THE EVILS OF WAR.

Bluntschli says that of the various modern acts and movements that have tended to ameliorate the evils of war, the promulgation by the War Department of the instructions for the government of the armies of the United States in the field, drawn up by Francis Lieber, LL. D., as a general order, April 24, 1863, was among the first and most remarkable.

Major Davis, U. S. A., in his work upon international law, says of these instructions:

> They are still in substantial accordance with the existing rules of international law upon the subject of which they treat; and form the basis of Bluntschli's and other elaborate works upon the usages of war. They are accepted by text writers of authority as having standard and permanent value and as expressing with great accuracy the usage and practice of nations in war.

These instructions treat of martial law, military jurisdiction, military necessity, retaliation, public and private property of the enemy, protection to persons, religion, and to the arts and sciences. They direct as to the punishment of crimes against the inhabitants of hostile countries, as to deserters, prisoners of war, booty on the battlefield, partisans, armed enemies not of the hostile armies, scouts, prowlers, war traitors and rebels, spies, safe conducts, flags of truce, messengers, parole, armistice, capitulation, assassination, etc. Although revision would doubtless be made in the case of a great foreign war, still they contain very much that would be useful in time of war to the naval service and that should become familiar to officers of the Navy and Marine Corps.

In 1880 the *Institut de Droit International* adopted a code of "Laws of war on land," based upon these instructions for the government of armies of the United States, upon the articles of the Geneva conventions of 1864 and 1868, upon the declarations of St. Petersburg and Brussels, and upon the official manuals adopted by France, Russia, and Holland. This code has certain changes, some improvements, from that adopted by the United States, but as it has not been adopted generally by the powers, may be considered as a movement rather than as an authoritative act.

The Geneva convention for the amelioration of the condition of the sick and wounded of armies in the field has been generally agreed to by the civilized powers, and was acceded to by the United States, March 1, 1882.

The additional articles which cover cases of maritime warfare, while they are accepted in principle, failed to secure ratification and remain without binding force.

The President of the United States, in his proclamation announcing the accession of this country to the Geneva convention, reserves the promulgation of the additional articles until the exchange of the ratification thereof between the several contracting States shall have been effected and the said additional articles shall have acquired full force and effect as an international treaty.

PART II.

INTERNATIONAL LAW AS MODIFIED BY WAR.

CHAPTER VI.

GENERAL CHARACTER OF WAR; MARITIME WAR.

SECTION 39.—NATURE OF WAR.

War changes the relations of all States. The relations of the contending parties, now known as the belligerents, become at once and directly affected by this change from a normal to an abnormal state of affairs, and indirectly the relations of the States which take no part in the war become changed toward the belligerents as they now assume the position of neutrals. Says Phillimore:

> War, of necessity, brings with it new rights to the belligerents and new obligations to the neutral.

In the early history of nations and tribes it has been said that war was the normal state of society, or as the philosopher Hobbes put the matter, it was "*bellum omnium contra omnes*," war of all against all. To-day peace is the normal state and war the abnormal. At present, far from being a struggle for the mastery alone, war is looked upon as a contest in support of the rights of a nation and as a means when all others have failed to bring about a settlement of disputes. War, then, is the last resort of nations, the *ultima ratio regum*, and the ethical question of right or wrong with regard to the opposing parties has nothing to do with the legal rules applicable to the combat. In the eye of international law all wars are just, in so far as the belligerent rights of the parties are concerned; that is to say, third States or neutrals are not permitted to presume that one of the parties is wrong and not entitled to the rights of war.

Ethically speaking, of course, the great majority of wars have been both unjust and morally wrong on one side or both; and that, indeed, was the character of all wars of conquest or mere aggression, and of so many dynastic wars when the people had no voice or interest in the question.

Since the time of the Thirty Years' war there has been a steady improvement in the usages of war, caused partly by the influence of the writings of Grotius and his successors and partly by the general progress of civilization in which the sentiments of humanity and justice have come to prevail over those of barbarity and greed.

The rules of the laws of nations have been gradually extended and accepted during the last two hundred years until to-day they control to a very large extent the usages of war in all civilized countries.

War has been defined to be a hostile contest with arms between two or more States or communities claiming sovereign rights.

Creasy says:

> That there have almost always been wars, and that wars will again occur, are melancholy certainties, against which it is vain to shut our eyes. It is equally certain that a nation which professed an intention never to engage in war would, if its professions were believed, be very soon insulted, maltreated, and oppressed by other nations, and that such a pacific course on its part would most likely end in its dismemberment and national destruction.

It is not safe to indulge in the pleasant illusion that wars can be stripped of all their horrors and of all their burdens. The long peace from 1815 to the Crimean war was a period of peace societies which cherished visions of perpetual peace and good will, and of philanthropic writers who would remodel the laws of war so that war was to become a mere duel between the armed forces of nations. The old theory as to war was that all citizens or subjects of one belligerent State were enemies of all citizens or subjects of the other. The new theory was that war is a contest between State and State and that private citizens of the belligerent parties should not be molested either as to their persons or their property.

The practice and usage do not conform to either theory. The true view would seem to be found in a mean of the two theoretic extremes. The old theory is, of course, wholly contrary to the humane spirit of our time; yet the new would tend to cripple the weaker nations in repelling the attacks of powerful neighbors.

Certainly upon the invasion of a foreign country a general uprising of its inhabitants can not be prohibited by any reasonable rules of warfare. Furthermore, such invasion is generally accompanied by demands upon the inhabitants by way of requisitions and contributions for whatever is necessary for the subsistence of the invading army, so that invasion is not a mere affair of the government. This levying of contributions is done in a regular manner, to be sure, but it is virtually the confiscation of private property and often on a very large scale. It differs from the old pillage only in being regulated. At sea private property is still subject to capture by the rules of international law, and it is made a reproach in maritime wars that the rule is less liberal than in land wars. Sir Henry Maine, quoting from a manual drawn up for the English army, says:

> The object of wars, politically speaking, is the redress by force of a national injury. The object of war in a military point of view is to procure the complete submission of the enemy at the earliest possible period with the least possible expenditure of men and money.

The accomplishment of this object may often be promoted to an indefinite extent by depriving the enemy of resources which happen for the moment to be private property.

Our discussion upon the objects of war may well be closed with a quotation from the preface to the third edition of Hall's work on International law. Speaking of the next great war, he says:

> Above all and at the bottom of all, there will be the hard sense of necessity; whole nations will be in the field; the commerce of the world may be on the sea to win or lose; national existence will be at stake. Men will be tempted to do anything which will shorten hostilities and tend to a decisive issue.

SECTION 40.—CLASSIFICATION OF WAR.

Wars have been classified in various ways according to the point of view from which they are regarded. In a military sense they are often classified as offensive or defensive wars, according to the nature of the military operations which are carried on.

In a historical or political sense they are classified as wars of intervention, wars of insurrection or revolution, wars of independence, wars of conquest, wars of opinion, religious wars, national wars, civil wars, etc. In the sense of international law, however, wars are classified with reference to the legal status of the parties engaged and the international rights and obligations which result therefrom. According to international law, wars are either public or mixed, according to the antecedent relations of the combatants.

Wheaton's definition of a public war is a contest by force between independent sovereign States. If it is declared in form or duly commenced, it entitles both the belligerent parties to all the rights of war against each other. Whatever is permitted by the laws of war to one of the belligerent parties is equally permitted to the other.

A mixed war is a war between members of the same political society. It is a civil war, though it may not reach beyond the proportions of an insurrection or a local rebellion. The movements in Spain in 1866 and 1867 were of this nature. Such a war may attain sufficient strength and magnitude to entitle both contending parties to all the rights of war with respect to each other and to neutral States. Again, according to the manner and degree of the hostile operations, wars are said to be perfect or imperfect.

A perfect war is one in which, under all circumstances permissible by the laws of war, one State and all of its members are at war with another State and all of its members.

An imperfect war is a war which is limited either as to persons or as to place or objective. The hostilities carried on and authorized by the United States against France in 1798 were of this nature.

SECTION 41.—DECLARATION OF WAR.

(1) *Between two independent nations.*—As between two independent States, war may begin by a formal declaration, or by actual hostilities without any declaration. Halleck says:

> It was customary in former times to precede hostilities by a formal declaration communicated to the enemy. This was always done by the ancient Greeks and Romans, but in modern times such formal declaration has fallen into disuse.

In a compilation of cases of hostilities without previous declaration extending from 1700 to 1871, Colonel Maurice of the British army found but ten instances in which a declaration of war preceded hostilities. In some cases there was not even a manifesto, and the intention was to gain an advantage by surprise.

It is now generally agreed that a manifesto or declaration within the territory of the State declaring the war is necessary in order to warn at least the citizens of the State and neutrals. Thus in 1812 Congress passed an act containing a declaration of war to be issued by the President, but the act was not communicated to England. Hostilities began immediately. With the present telegraphic communication there is no longer possibility of surprise.

In 1870 war was determined upon in the French Chambers the 16th of July, and on the 19th a formal declaration was handed to the Prussian Government at Berlin. In the case of the *Teutonia* the judicial committee of the English privy council held that the date of the beginning of the war was the 19th and not the 16th, the ground being that no act of war had been committed before the declaration. The war of 1877 between Russia and Turkey was also formally declared. But

these two cases of formal declaration must be admitted to be exceptions to the ordinary practice of modern times.

When there is no declaration, war dates from the first act of hostilities, and even if there should be a subsequent declaration, the beginning of hostilities still remains the date of the beginning of the war.

(2) *In civil wars.*—In a civil war there is never a formal declaration, and the war dates from the recognition of belligerency of the insurgents either by a third power or by some act of war on the part of the legal government, such as a declaration of a blockade, the exchange of prisoners, or the like.

Thus in the case of our civil war in 1861, although Fort Sumter was fired upon on April 12 and demolished, yet there was no legal war until the proclamation of blockade by President Lincoln on the 17th of April, a blockade being an act of war which affected neutrals.

Section 42.—Maritime War.

Maritime wars have been less barbarous than those on land, and for several reasons. In the first place, there is an absence of that large class of noncombatants with whom armies come in contact on land; again, in maritime wars neutrals are interested to an important degree, and they have been able to make their influence felt in restraining the excesses of belligerents; and finally, the seizure of property is regulated by prize courts composed of men of judicial training, and not subject to the excitement surrounding warfare.

As to the distinction between enemy's property at sea and land Dana says:

> Where private property is taken it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it *prima facie* a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea, for it is a subject of taxation, contribution, and confiscation. The humanity and policy of modern times have abstained from the taking of private property not liable to direct use in war when on land. Some of the reasons for this are the infinite varieties of the character of such property; from things almost sacred to those purely merchantable; the difficulty of discriminating among these varieties; the need of much of it to support the life of noncombatant persons and animals; the unlimited range of places and objects which would be opened to the military, and the moral dangers attending searches and captures in households and among noncombatants. But on the high seas these reasons do not apply. Strictly personal effects are not taken. Cargoes are usually purely merchandise. Merchandise sent to sea is sent voluntarily, embarked by merchants on an enterprise of profit, taking the risks of war; its value is usually capable of compensation in money, and may be protected by insurance; it is in the custody of men trained and paid for the purpose; and the sea upon which it is sent is *res omnium*, the common field of war as well as of commerce. The purpose of maritime commerce is the enriching of the owner by the transit over this common field, and it is the usual object of revenue to the power under whose government the owner resides.
>
> The matter may then be summed up thus: Merchandise, whether embarked upon the sea or found on land, in which the hostile power has some interest for purposes of war, is *prima facie* a subject of capture. Vessels and their cargoes are usually of that character. Of the infinite varieties of property on shore, some are of this character and some not. There are very serious objections of a moral and economical nature to subjecting all property on land to military seizure. These objections have been thought sufficient to reverse the *prima facie* right of capture. To merchandise at sea these objections apply with so little force that the *prima facie* right of capture remains.

England, as the great sea power, has constantly refused to discuss any proposition having for its end the abolition of the right of capture of private property at sea.

Lord Palmerston said in 1859:

The existence of England depends upon her maritime preponderance, and she could not maintain herself if she were deprived of the right to capture the private property of the enemy and to make prisoners of the crews of its merchant ships. A maritime power like England can not renounce any proper means of weakening her enemies, and if she did not take as prisoners the sailors of their merchant ships they would soon be employed in fighting upon the ships of war. Besides, private property is no more respected on land than in maritime wars; for an army, when it invades an enemy's country, takes whatever it has need of.

In the case of the Franco-Prussian war of 1870, the French having a superior navy blockaded the German ports and captured 90 merchant vessels with their cargoes, the value of which, says Barbon, did not much exceed 6,000,000 francs. During the same period the German armies in France took, by way of requisitions and contributions, property valued at more than 600,000,000 francs, not counting the unavoidable damage caused by the march of the armies.

As to the policy of taking private property, Von Moltke wrote:

The greatest benefit in the case of war is that it shall be terminated promptly. In view of the end it should be permitted to use all means save those which are positively condemnable. I am by no means in accord with the declaration of St. Petersburg when it declares that the weakening of the military forces of the enemy constitutes the sole legitimate procedure in a war. No, it is necessary to attack the resources of the government of the enemy, his finances, his railways, his provisions (stores), and even his prestige.

Von Moltke did not believe in the efficiency of military codes or regulations to prevent lawlessness of armies; he claimed to find the best remedy for this in thorough discipline and an efficient commissary. It may be well a question whether the policy of removing the burdens of war from the noncombatant class would tend to make wars less frequent or to lessen their duration; and on the whole there is a certain vigorous common sense in the view of Von Moltke. His view was vigorously and even harshly applied in the Franco-Prussian war, and it must be said that the conduct of that war on the part of the Germans, the seizure of the Provinces of Alsace and Lorraine, and the exaction of the enormous indemnity of 5,000,000,000 francs caused a shock to those who believed that the character of wars had changed. There was no lawless plundering by an undisciplined soldiery, but never in modern times has the hand of war weighed more heavily upon a beaten nation during the entire period of hostilities.

From the present outlook on the Continent of Europe it seems probable that no sentiments of humanity will stand in the way of striking hard at every resource of the enemy, and instead of further exemption of private property at sea from capture, it would seem that the greatest preparations are being made for the destruction of the enemy's commerce. Not only commerce destroying, but it is probable that contributions and exactions from rich seaport towns will be resorted to in the next maritime war.

SECTION 43.—PRIVATEERS; VOLUNTEER NAVY.

The question next arises as to privateers—will they be used in the future? By the declaration of Paris, the signatory powers agree that privateering is and remains abolished. This declaration has been acceded to by all maritime powers except the United States, Spain, and Mexico. The declaration is not binding except between those powers who have acceded to it.

The United States have taken a somewhat varying position toward privateering. After the revolutionary war treaties were made pro-

viding for its abolition, especially with Prussia in 1785. During the war of 1812 privateering was extensively practiced. During the Mexican war it was not practiced on either side. In 1856, when it was proposed to the United States to accede to the Declaration of Paris, the Government declined unless private property at sea was exempted from capture.

In the early days of the civil war the United States expressed a willingness to accede to the declaration of Paris under certain conditions, which were not accepted by the European powers.

In 1863, during the same war, a law was passed by Congress providing for the issuing of letters of marque and reprisal by the President, but the law was never put into execution. It can be stated without hesitation, however, that the United States still maintain the right to issue letters of marque and reprisal to the fullest extent, and it is only a question of policy which would prevent its exercise in any war in which they might be engaged in the future.

As to the policy of privateering, Woolsey says:

> The right to employ this kind of extraordinary naval force is unquestioned, nor is it at all against the usage of nations in times past to grant commissions even to privateers owned by aliens.
>
> The advantages of empowering privateers are (1) that seamen thrown out of work by war can thus gain a livelihood and be of use to their country, (2) a nation which maintains no great navy is thus enabled to call into activity a temporary force on brief notice and at small cost. On the other hand, the system of privateering is attended with very great evils. (1) The motive is plunder. It is nearly impossible that the feelings of honor and regard for professional reputation should act upon the privateersman's mind. * * * (2) The control over such crews is slight, while they need great control. * * * The officers will not be apt to be men of the same training with the commanders of public ships and can not govern their crews as easily as the masters of commercial vessels can govern theirs. (3) The evils are heightened when privateers are employed in the execution of belligerent rights against neutrals, where a high degree of character and forbearance in the commanding officer is of especial importance.

The conditions of modern naval warfare have lessened the desirability of privateering from the standpoint both of the privateer and the national government.

The prizes worth capturing now would be steamers, and for this reason privateers would necessarily be steamers also. The cost of steamers, of their maintenance, and the difficulty of obtaining coal abroad would render privateering very expensive and uncertain, especially as the remunerative prizes would be the large, fast, and probably partially armed merchant steamers without convoy. The difficulty of capturing these and of getting them into port after capture would render privateering a very doubtful financial venture, especially as without proper adjudication and sale, which could only be done in a home port, the privateer would have no recompense.

Moreover, from a national point of view, seafaring men thrown out of employment in war time would be needed in the naval service and would be readily absorbed by the regular men-of-war. As privateers would at first offer hopes of plunder with short terms of service the absorption of seafaring men by this class of vessels would certainly cause a scarcity of men for ships of war, especially as the crews of the privateers would, when captured, be retained as prisoners of war, and this scarcity of seafaring men would become instead of a temporary evil a permanent one. It would be much wiser as a national policy to take vessels fit for this kind of work into the navy from the merchant service and commission their officers with acting appointments in the navy from the national authority, as was done during the late civil war.

In August, 1870, during the Franco-German war, notwithstanding that France and Prussia were both signatories to the Declaration of Paris, Prussia ordered by decree the creation of a volunteer navy. The ships of this navy were to be private property, the officers and crews were to be merchant seamen, furnished by the owners, but under naval discipline and wearing uniforms, the officers provided with temporary commissions, but not forming part of the regular navy in any way, though the vessels were to sail under the flag of the North German navy. The French Government protested against this proposed employment of private vessels as a violation of the declaration of Paris, and addressed a dispatch to the English Government, who referred the matter to the law officers of the Crown, who in turn decided that the difference between the proposed volunteer navy and privateers was so great that it could not be considered an evasion of the declaration of Paris.

Hall, an English authority, however, says:

Unless a volunteer navy were brought into closer connection with the State than seems to have been the case in the Prussian project it would be difficult to show as a mere question of theory that its establishment did not constitute an evasion of the Declaration of Paris. The incorporation of a part of the merchant marine of a country in its regular navy is, of course, to be distinguished from such a measure as that above discussed.

As to captures by a private vessel not commissioned in any way by the national government, Halleck says:

All agree that defensive hostilities on the high seas, as well as on land, without a commission or public authority, are not criminal acts, but acts fully authorized by the laws of war.

Walker, a late English authority, says upon this point:

An ordinary uncommissioned merchantman belonging to a belligerent State may, of course, resist capture, and therefore seize in self-defense, but ought not in general to attack. If, nevertheless, an uncommissioned master elect to lay aside his non-combatant character and attempt to make prize, he is, as between himself and the enemy government, a lawful combatant, and there is no excuse for his treatment otherwise than as such.

Hall says upon this point:

Noncommissioned vessels have a right to resist when summoned to surrender to public ships or privateers of the enemy. The crews therefore which make such resistance have belligerent privileges; and it is a natural consequence of the legitimateness of their acts that if they succeed in capturing their assailant the capture is a good one for the purpose of changing the ownership of the property taken and of making the enemy prisoners of war.

It may be reasonably expected in coming naval wars that steamers of the great mail lines will be armed so as to defend themselves from attack, and the defense could be legitimately carried to the point of a seizure of the attacking vessel, or a recapture if once taken. Without proper commission a private vessel should act only directly or indirectly on the defensive, and not go out of the way to capture enemy vessels, nor should it take any belligerent action toward vessels of a neutral power.

CHAPTER VII.

EFFECT OF WAR AS BETWEEN ENEMIES.

SECTION 44.—EFFECT OF WAR AS TO PERSONS.

(*a*) *Combatants and noncombatants.*—According to the rules of warfare the citizens of the belligerent States are divided into two general classes, namely, combatants and noncombatants. Of noncombatants but a few words need to be said. As the name implies, they are that portion of the inhabitants not bearing arms, but engaged in peaceful pursuits. In their persons they are by modern usage exempt from hostile attack. They may not be killed or ill treated unless they commit acts which are deemed dangerous or injurious to the cause of the opposing belligerent. They are, however, exposed to all the personal injuries which may result indirectly from military or naval operations, as the firing upon a ship carrying passengers or the bombardment of a town or other acts of war.

Combatants are those who take an active part in hostilities, and as a rule are authorized by the government to bear arms against the enemy and are enrolled in the organized army or navy of the State. To such persons are accorded, without question, all the rights of war; they are the legal belligerents, and if taken prisoners they may not be sentenced to death, but are entitled to honorable treatment.

But the question has been raised, and notably since the Franco-German war of 1870, whether certain classes of men who bear arms against the enemy are entitled to be considered as combatants. The German authorities contended in that war that the French corps of *franc-tireurs* and the national guard (militia) should not be considered as regular soldiers unless they wore a uniform recognizable at gunshot, and some of the German generals published proclamations to the effect that if taken they would be executed. It was also declared that in order to be entitled to be treated as prisoners they must show that they had been called under the flag by legal authority and that their names were on the list of some organized military corps.

The form of such a proclamation as actually issued in the department of the Ardennes December 10, 1870, was as follows:

> Every individual who does not form a part of the regular army or of the *garde mobile* and who may be found in arms, whether he goes under the name of *franc-tireur* or any other, whenever he shall be seized *in flagrante delicto* engaged in hostilities against the German troops, will be considered as a traitor and will be hanged or shot without form of trial.

The uniform of a *franc-tireur* was a blue blouse with red trimmings and a kepi, and their corps was organized according to law. The *franc-tireurs* were attached to the army corps or divisions and were under the orders of the corps commanders.

The French commander's government replied that if the *franc-tireurs* were not treated as regular combatants the corps commanders of the French armies would resort to reprisals toward the German *landwehr* and *landsturm*.

The Prussian *landsturm*, as instituted to take part in the war of liberation in 1813, was not supplied with uniforms, being in fact the ordinary peasantry of the country. The same is true, in the main, of the Spanish and the Portuguese who took part in the Peninsular war against the French. The Prussian proclamation against the *franc-tireurs* was therefore hardly in accordance with the ordinary usages of war, or with Prussia's own practice in her earlier wars with the French.

The German authorities also objected to the Turcos serving with the French armies, upon the ground that they were barbarians. The French claimed that they were under the command of French officers and subject to the same discipline and restraints as the other corps of the French army. Furthermore, the French Government stated that it had not been proved that the Algerian troops had committed any act as barbarous in nature as those of which the Prussians had been guilty toward inoffensive inhabitants. Hozier, in his Franco-Prussian War, speaks, however, of the bad conduct of the Turcos in the battle of Wissembourg.

There can be little doubt that international law forbids the enrollment by civilized nations in their armies of savages to whom the laws of war are unknown, or the employment of such troops as auxiliaries who neither know nor respect the rights and usages of civilized peoples.

At the congress of Brussels in 1874 this question of combatants was the most burning one under discussion. The great military powers of Europe were, for the most part, in favor of limiting the rights of combatants to the members of the regularly organized armies, thus making it illegal even for a people to rise *en masse* to repel an invader. The smaller States generally and England opposed this view.

(*b*) *Prisoners of war.*—Certain noncombatants may be taken as prisoners of war—the monarch and members of the hostile reigning family, male or female, the chief and the chief officers of the hostile government, its diplomatic agents, and all persons who are of particular use and benefit to the hostile army or its government.

Citizens who accompany an army, such as sutlers, newspaper correspondents, contractors, etc., are liable to be captured and held as prisoners of war. Bluntschli, the United States Instructions, and the code recommended by the *Institut de Droit International* include newspaper correspondents among persons liable to capture and detention as prisoners of war. The latter code says that they may be detained for such a length of time only as is warranted by strict military necessity. Hall says:

> Newspaper correspondents in general seem hardly to render sufficiently direct service to justify their detention as a matter of course, and they are quite as often embarrassing to an army which they accompany as to its enemy.

Chaplains, officers of the medical staff, apothecaries, hospital nurses etc., are not liable to detention as prisoners of war unless the commander has reason to detain them.

Officers and seamen of merchant vessels of the enemy may, according to usage, be detained as prisoners of war on the ground that they can be immediately employed on ships of war. In 1870 Bismarck denied the right to make masters and seamen of merchant vessels prisoners of war, and he resorted to reprisals and sent Frenchmen of local prominence as prisoners to Bremen in numbers equal to that of the masters

of merchant vessels who were detained in France. There is no warrant for such action, and it has been well said that it was in every way unjustifiable that such an attempt should be made to prevent an enemy from acting within his undoubted rights by means which are reserved only to punish or brand violations of the laws of war.

A new question arose in 1870 as to the character of persons transported across the enemy's lines in balloons. Bismarck intimated that they would be treated as spies notwithstanding the publicity of their movements, secrecy and disguise being impossible under the circumstances.

In the proposed manual of the laws of war of the *Institut de Droit International*, 1880, it is provided that aeronauts charged with observing the operations of an enemy, or with the maintenance of communications between the various parts of an army or theater of military operations, are to be treated as prisoners of war.

In the case of citizens of one belligerent State who are within the territory of the other belligerent at the breaking out of war there have been three rules in operation since the sixteenth century: (1) A right to detain such persons as prisoners. This has now become obsolete, though used by Napoleon against English tourists in 1803. (2) To permit these persons to withdraw within a reasonable period; this is still in force by treaty and otherwise, but has been largely superseded by (3), which is to permit them to remain unmolested so long as they conduct themselves peaceably or during good behavior. This last rule is growing in usage and is embodied in many treaties and will probably become the sole rule. Of course a belligerent will always retain the right to expel such alien enemies as, in his opinion, are dangerous to the State.

Ordinarily it would be a great hardship for merchants and others resident in a foreign country (and the number is large at the present day) if at the outbreak of war they were obliged to remove with their goods.

In 1870 the French Government gave permission on July 20, the day after the declaration of war, for Germans to remain in France; but at a later date the Government so far rescinded this permission as to expel them from the department of the Seine and to require them either to leave France or to retire to the south of the Loire. This act has been harshly criticised, but it was a perfectly legitimate war measure if the French Government thought it a military necessity.

By an act of Congress of July 6, 1798, alien enemies are liable "to be apprehended, restrained, secured, and removed." The President of the United States is authorized to execute the law and to make such regulations as are necessary for its enforcement. In cases of complaints against an alien enemy the courts of the United States have jurisdiction and are empowered to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained until the order which may be made concerning his case by the courts be performed. This act, which is still upon the statute books, assumes that aliens may remain if there is no cause of complaint against them. Hall says:

> When such persons are allowed to remain in the country they are exonerated from the disabilities of enemies, and they are placed in the same position as other foreigners in the country.

(*b*) *Care of the sick and wounded.*—Much has been done during the last thirty years to alleviate the sufferings caused by war and battles. In our civil war the work of the Sanitary and Christian commissions

showed what could be done in this direction. The Geneva convention of 1864, to which nearly all nations have subscribed, makes ambulances and military hospitals neutral, including surgeons and nurses. This goes under the general name of the Red Cross Society, (the badge being a red cross on white ground), and in many countries there is a national society, the members of which may and do volunteer to act in any war, whether their own States are concerned or not. It may be well to give a résumé of the addtional articiles of the Geneva convention which apply to maritime warfare.

Boats picking up the shipwrecked or wounded during and after an engagement enjoy the character of neutrality as far as possible, but the wrecked and wounded picked up and saved must not serve again during the continuance of the war.

The religious, medical, and hospital staff of any captured vessel are declared neutral, and on leaving the ship may remove the articles and surgical instruments that are their private property.

The captured military hospital ships remain under martial law in all that concerns their stores; they become the property of the captor, but the latter must not divert them from their special appropriation during the continuance of the war.

Merchant vessels, no matter of what nationality, charged exclusively with the removal of sick and wounded, are protected by neutrality, but the fact noted upon the ship's log book that the vessel has been visited by an enemy's cruiser renders the sick and wounded incapable of serving again during the war. The cruiser has the right of putting an officer on board to accompany the vessel and verify the good faith of the operation. The cargo of the merchant vessel is also protected, unless it is of a nature liable to confiscation by belligerents.

The belligerents retain the right to forbid the neutralized vessels from all communication or from any course which may be prejudicial to secrecy. Special conventions may be entered into by the commander in chief in order to neutralize temporarily and specially vessels removing the sick and wounded. Wounded or sick sailors and soldiers when embarked, to whatever nation they may belong, shall be protected and taken care of by their captors.

The distinctive flag to be used with the national flag in order that the neutrality may be observed is a white flag with a red cross.

Military hospital ships are to be distinguished by being painted white outside with a green strake.

Hospital ships equipped by the Red Cross societies shall, when properly commissioned, be considered neutral by the belligerents. These hospital ships are marked by carrying their national colors and the Red Cross flag and are further marked by being painted white with a red strake. These ships bear aid and assistance to the wounded and wrecked belligerents without distinction of nationality. During and after the battle they must take care not to interfere with the movements of the combatants and must do their duty at their own risk and peril.

The belligerents have the right of controlling and visiting them, can refuse their assistance, and require them to depart or can detain them if necessary.

Section 45.—Conduct of Hostilities.

Certain usages and rules of warfare on land and at sea are treated at more or less length in other chapters and sections. In this section it is proposed to complete the description of the established usage as to the conduct of hostilities, whether in land, naval, or combined operations.

Instruments of war.—With certain exceptions, such as the use of poison, poisoned weapons, of explosive bullets, or of weapons that will cause unnecessary suffering, any instrument of destruction, open or concealed, may legitimately be used against an enemy.

Halleck says:

> The implements of war which may lawfully be used against an enemy are not confined to those which are openly employed to take human life, as swords, lances, firearms, and cannon, but also include secret and concealed means of destruction, as pits, mines, etc. So, also, of new inventions and military machinery of various kinds; we are not only justified in employing them against the enemy, but also, if possible, of concealing from him their use.

In relation to this subject the conference at Brussels in 1874 adopted the following as a portion of a proposed code of the laws of war. Although this is not authoritative, it agrees with the best and most enlightened sentiment of the present time. By it are forbidden: (*a*) the use of poison or po soned weapons; (*b*) murder by treachery of individuals belonging to the hostile nation or army; (*c*) murder of an antagonist who having laid down his arms or having no longer the means of defending himself has surrendered at discretion; (*d*) the declaration that no quarter will be given; (*e*) the use of arms, projectiles, or substances which may cause unnecessary suffering, as well as of the projectiles forbidden by the Declaration of St. Petersburg in 1868.

Attack and siege of fortified places.—Cutting off the food and water supply of a besieged place in order to hasten its surrender is a legitimate means of warfare. Fortified places can be taken by an open assault or by regular siege. If the assault is made no notice is given, as surprise is essential to its success. In case of war the very fact of a place being fortified is evidence that at any time it is liable to attack, and the noncombatants residing within its limits must be prepared for a contingency of this kind. Says Halleck:

> A siege, is a military investment of a place so as to intercept or render dangerous all communications between the occupants and persons outside of the besieging army. * * * The object of a military siege is * * * to reduce the place by capitulation or otherwise into the possession of the besiegers. It is by the direct application of force that this object is sought to be attained, and it is only by forcible resistance that it can be defeated. Hence, every besieged place is for a time a military garrison; its inhabitants are converted into soldiers by the necessities of self-defense.

During the Franco-German war in twenty-two sieges made by the Germans not a single assault was attempted. It was found to be easier, more effective, and it was claimed more humane to invest the places, seal all approaches, to prevent the supply of provisions or reënforcements, and then by long-range siege guns keep up a constant fire beyond the range of the guns of the besieged. This fire was not concentrated upon the fortifications, but was directed upon the town and caused such ruin and death that the place was forced to surrender through famine and excessive suffering. There were cases like that of Péronne, where the town was partially destroyed while the ramparts were nearly intact. There seems to be good reason for belief that more lives were saved by this means of attack than by an ordinary siege and assault.

Firing upon Paris by the Germans was commenced without previous notification, and upon a protest being made in January, 1871, by the diplomatic representatives in Paris, Bismarck responded to the effect that such notification was not required by the laws of war, that the

bombardment was dictated by military necessity, and that the neutrals were notified in September and October of 1870 of the dangers, and given permission then to pass through the German lines.

Bluntschli, German writer though he is, acknowledges that it is the usage to notify an intention to bombard a fortified place in order that the noncombatants, especially the women and children, can remove to a place of safety. He qualifies this, however, by saying that when it is necessary to surprise the enemy in order to carry rapidly a position the neglect to announce a bombardment does not constitute a violation of the laws of war.

It is quite probable, notwithstanding the existing and proposed manuals of the rules of war, that the examples of the Germans will be followed in the future.

General Le Blois, in 1865, in advocating an indiscriminate shelling similar to that the Germans afterwards practiced, said:

> Then death hovers over the heads of all. Each individual feels threatened as to his own personal existence and that of all he holds dear in the world, while at any moment his property may be destroyed by fire. * * * The governor is made responsible for all the disasters that occur; the people rise against him, and his own troops seek to compel him to an immediate capitulation.

Defense of fortified places.—Major Davis, in his outlines of international law, says, concerning this:

> The questions of defense in the case of a garrisoned fort and a fortified town are by no means the same. Duty may require a commander in the former case to resist to the last; in the latter, considerations of humanity enter into the problem of defense, and great weight must be attached to them when the question of surrender is presented to him for decision.

To show how much matters have changed in respect to the duration of defense, it may be of interest to state that during the Franco-German war the French military law prescribed the penalty of death to every commander who gave up his place without having forced the beseigers to pass through the successive stages of a siege and having repulsed at least one assault on the body of the place through a practical breach. General Ulrich, in his defense of Strasburg, perhaps the best defense of the war, could not obey this law. He could not repel or even await an assault, it being physically impossible for his men to remain on the ramparts during the fire kept up by the Germans. As a matter of fact, no French officer in command of a fortified place was able to observe this article during the entire war.

As there is considerable difference of opinion as to the right of the besieged in case of a temporary suspension of hostilities to revictual the place, or to repair breaches and throw up new works, these matters should always be a subject of special stipulation for the guidance of both the besieger and besieged.

The officer in command of a besieged place is alone the judge of the duration of his defense, and it may be continued as long as he may consider that it is to the military or other advantage of his government. The judgment of the besieger as to the protracted nature of the defense is not to be considered and will not excuse any undue violence upon his part after a surrender.

Unfortified towns and seaports.—Open or undefended towns, if they offer no resistance, are occupied by land forces to prevent disorder and pillage. They are subject, however, to requisition and contributions.

The propriety of levying contributions upon defenseless seacoast cities has been questioned. They are, it is feared, too tempting a mark

to escape, especially as it has been pointed out that the same thing is done inland.

In 1882 Admiral Aube, of the French navy, in an article upon the naval war of the future, in the *Revue des Deux Mondes*, expressed the opinion that armored fleets in possession of the sea will turn their powers of attack and destruction against the coast towns of the enemy, without regard to whether these are fortified or not, or whether they are commercial and military, and will burn them and lay them in ruins or at the very least will hold them mercilessly for ransom. He pointed out that such would be the true policy of France in the event of a war with England.

This, at the time, was a startling suggestion; and when Admiral Aube was appointed minister of marine and was allowed to change the shipbuilding policy of France to conform to his views, the British Government asked whether this was the official view of the French cabinet. The French Government disavowed any official adoption of this policy of warfare; but there was not much doubt that it was seriously considered.

There are other evidences of the coming change. There is reason to suppose that in 1878 it was intended by the Russian Government in case of war with England to send the fleet then at Vladivostok to attack the undefended towns on the coast of Australia and lay them under contribution.

In 1888 and 1889 attempts were made during the English naval maneuvers to show what might be the consequences of deficient maritime protection by practicing imaginary bombardments and contributions on various cities. Objections were made to these proceedings, on the ground that they might be cited as giving an implied sanction to similar action by an enemy. Correspondence in the journals followed, in which several naval officers of authority combated these objections, partly on the ground that in view of foreign naval opinion an enemy might be expected to attack undefended English towns, and partly on the ground that this attack would be a proper operation of war.

The tendency in modern times is growing to exact in money what was formerly destroyed or taken by way of pillage. There is now greater accumulation of treasure in places and especially in great seaport cities. Notwithstanding all the arguments against it on the ground of humanity, especially from writers of the nation most likely to be affected, it is probable that such exactions of contributions will be enforced in maritime war as they have been in recent times in land warfare. Furthermore, it is difficult to see any great moral distinction in the two cases.

The conference at Brussels declared against the bombardment of open places, but, as Walker says, "the practice of belligerents has hardly attained to this merciful standard, and it may well be doubted how far such moderate counsels would in a future embittered struggle protect from injury the houses and dockyards of a defenseless seaport." Certainly the destruction of such property is less inhuman than that of life.

The bombardment of the unfortified city of Valparaiso by the Spanish fleet in March, 1865, was in consequence of an insult to the Spanish flag, and a persistent refusal on the part of the Chilean Government to give any satisfaction. The admiral commanding, who was also intrusted with diplomatic functions, was instructed to make demand for a salute to the Spanish flag by a fixed date, and to enforce the

demand, if necessary, by a bombardment of Valparaiso. The demand was made, accompanied by a notice that one month from its date the Spanish fleet would move into the harbor and, firing a blank charge, would wait an hour before commencing the bombardment, when, should it be refused, the vessels would open fire, directing their guns at the public buildings only. Notice was given that all private property would be respected as far as possible, and a request made that all churches and hospitals should be distinguished by flags in order that the fleet might carefully avoid firing at them.[1]

Deceit; spies.—Halleck says:

> War makes men public enemies, but it leaves in force all duties which are not necessarily suspended by the new position in which men are placed toward each other. Good faith is therefore as essential in war as in peace, for without it hostilities could not be terminated with any degree of safety, short of the total destruction of one of the contending parties. This being admitted as a general principle, the question arises, How far may we deceive an enemy and what stratagems are allowed in war? Whenever we have expressly or tacitly engaged to speak the truth to an enemy, it would be perfidy in us to deceive his confidence in our sincerity. But if the occasion imposes upon us no moral obligation to disclose to him the truth, we are perfectly justifiable in leading him into error either by words or actions. * * * Feints or pretended attacks are frequently resorted to, and men and ships are sometimes so disguised as to deceive the enemy as to their real character, and by this means enter a place or maintain a position advantageous to their plan of attack. But the use of stratagems is limited by the rights of humanity and the established usages of war.

The employment of spies, which is another form of deceit in war, is allowable by the rules of war; but the punishment for being a spy is death upon capture by the enemy.

A spy is a person who secretly, in disguise or under false pretenses, seeks information with the intention of communicating it to the enemy. Any person in his proper uniform, worn so that it is recognizable, who penetrates within the enemy's lines with the intention of collecting information is not considered as a spy, and if captured becomes a prisoner of war.

An individual found as a spy can not demand a regular trial as a right; he is tried and treated according to the laws in force in the army which captures him. If a spy regains his own lines he can not be treated as a spy if subsequently captured as a belligerent.

The use of foreign or enemy's flag or uniform.—The Regulations of the United States Navy state that the use of a foreign flag to deceive an enemy is permissible, but that it must be hauled down before a gun is fired, and under no circumstances is an action to be commenced or a battle fought without the display of the national ensign.

On land it is not permitted to use the enemy's flag or uniform for purposes of deceit. If for reasons of necessity the enemy's uniform, acquired by capture, is worn it should have some distinguishing mark sufficiently prominent to attract attention at a distance.

Flags of truce.—Communication between belligerents can be established by flag of truce, which is a plain white flag. The bearer of a flag of truce on land who with proper authority presents himself to the other belligerent for the purpose of communication is entitled to complete inviolability of person. He may be accompanied by a bugler or drummer, by a color bearer, and if need be by a guide and an interpreter, all of whom shall be entitled to a similar inviolability of person.

The commanding officer of the belligerent to whom the flag of truce is sent is not obliged to receive the flag under all circumstances; if he

[1] Glass, International Law.

should receive the flag he has the right to take such measures of precaution as will prevent any injury being done to his cause by the presence of an enemy within his lines. This may be done by blindfolding the bearer, detaining him at an outpost, or in any other manner which may be deemed necessary.

If the bearer of a flag of truce abuse his trust he may be detained, and if he should take advantage of his mission to abet a treasonable action he forfeits his character of inviolability.

In operations afloat the senior officer alone is authorized to dispatch or to admit communication by flag of truce; a vessel in position to observe such a flag should communicate the fact promptly. The firing of a gun by the senior officer's vessel is generally understood as a warning not to approach nearer. The flag of truce should be met at a suitable distance by a boat or vessel in charge of a commissioned officer having a white flag plainly displayed from the time of leaving until her return. In dispatching a flag of truce the same precautions should be observed.

Firing is not necessarily to cease on the appearance of a flag of truce during an engagement. Should any person be killed under these circumstances no complaint can be made. If, however, it is made clear that the white flag is exhibited as a token of submission, firing is to cease.

Quarter; retaliation.—It is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No one in command of a body of troops has the right to declare that it will not give, and therefore will not expect, quarter. Quarter should only be refused in case of some conduct on the part of the enemy in gross violation of the laws of war.

A possible exception has been mentioned when, from special circumstances, it is not possible for an armed force to be encumbered with prisoners without danger to itself. This is mentioned in the instructions for the government of the armies of the United States. The opinion of the present day upon this subject seems to be that it is better to liberate the prisoners unless there is reason to fear that they would massacre their captors.

Retaliation is the right of compelling an enemy to observe the rules of war or to prevent him from violating any particular rule. It should not be resorted to until an opportunity is afforded the enemy for explanation or redress. If possible, the retaliation should be in kind unless the action of the enemy is in gross violation of the dictates of humanity and of civilized warfare.

Exemption of coast fisheries.—The question is brought up occasionally as to whether the boats and men employed in the coast fisheries of a belligerent State are free from capture and interference by an enemy. It has not been the rule to capture such boats and fishermen, though no exemption has been claimed for deep-sea fisheries except by the inhabitants of Nantucket during our war of 1812.

During the wars of the French Revolution and Empire the danger of the invasion of England was considered so imminent that no means were spared to cripple the French at sea, both with respect to fighting and transporting power. As a consequence the boats and men belonging to the French coast fisheries were captured. France protested and continental writers generally claim exemption for coast fisheries in time of war, but such exemption can not be claimed as a rule of inter-

national law, and when similar circumstances arise similar action may be anticipated in a maritime war.

Capitulations and cartels.—A capitulation is an agreement entered into by a commanding officer for the surrender of a military or naval force, or for the surrender of a town, fortress, or particular district under his command. Says Halleck:

> The power of the general or admiral to enter into an ordinary capitulation, the same as in the case of the flag of truce, is necessarily implied in his office. So of the chief officer of a town, fortress, or district of country. * * * But if unusual and extraordinary stipulations are inserted in the capitulation which are not within the ordinary and implied powers of the officer making it, they are not binding either upon the State or upon the troops.

A cartel is generally understood to be an agreement between belligerents for the exchange or ransom of prisoners of war. Hall extends the definition to include agreements as to direct intercourse, for treatment of prisoners, or generally as to the degree and manner in which derogations from the extreme rights of hostility shall be carried out. A cartel can be made between the commanders in chief or by the governments.

A cartel ship is a vessel employed in the exchange of prisoners or to carry proposals from one belligerent to another under a flag of truce. She is considered as a neutral vessel, and so far as her service is concerned is under the protection of both belligerents. She can carry neither cargo nor passengers for hire, nor any ammunition or implements of war, except a gun for firing signals. The authority to employ a cartel ship emanates from the State, but it may be issued by a subordinate officer in the execution of a public duty.

Treatment and exchange of prisoners.—Prisoners of war are prisoners of the captors' government, and are subject to the laws and regulations in force in the army or navy of the enemy. They must be treated with humanity, and are entitled to all articles in their personal possession as private property with the exception of arms.

They must give their true names and grades, and they may be confined, but only as a measure of security. The Government having prisoners of war on its hands is obliged to support them, and it is considered that, unless otherwise agreed, they should be treated, so far as food and clothing are concerned, upon the same basis as troops upon a peace footing.

A prisoner of war attempting to escape may after a summons be fired upon. If recaptured before being able to rejoin his own army he is subject only to disciplinary penalties or a more rigorous confinement. If he succeeds in escaping and is subsequently made a prisoner he incurs no penalty for his previous escape. If he has given his parole, however, he may be deprived of his rights as a prisoner of war.

Prisoners can not be compelled to take any part whatsoever in operations of war. Neither can they be compelled to give information concerning their army or country. They may be employed upon public works other than those of a military nature, provided such labor is not detrimental to health, nor humiliating to their military or naval rank, or, if civilians, to their social or official positions.

If allowed to engage in private industry their pay for such services may be collected by the authorities in charge of them. The sums so received may be used for bettering their condition or may be paid to them on their release, subject to deduction, if deemed expedient, of the expense of their maintenance.

Besides food and clothing prisoners of war are entitled to quarters, to medical attendance, and a reasonable allowance of fuel, bedding, and

camp equipage. In recent times no labor has been required from prisoners of war except what may be necessary for their sanitary protection, etc. Prisoners of war can be exchanged during hostilities. They may also be released during the continuance of hostilities by ransoms or on parole. An exchange is generally arranged by cartels and is of strict equality—man for man, rank for rank, disability for disability. By arrangement values expressed in terms of private soldiers can be given to different grades of commissioned and noncommissioned officers. It is not obligatory on the part of a belligerent to agree to an exchange of prisoners; nor can a prisoner of war be compelled to give a parole.

Ransom of prisoners was common in the seventeenth century and lasted until the second half of the eighteenth. Originally the captor had the right to sell his prisoners as slaves. This right seems to have been modified into a right of demanding ransom from the sovereign who had employed them. Terms of ransom were usually settled by treaty at the beginning of the war. Exchange of prisoners is, in fact, a development from this practice of ransom—payment in kind taking the place of money. Some features of the usage in exchanging prisoners could hardly have come into existence except through the former practice of sale and ransom; notably, the rule that sick and wounded prisoners are of less value in exchange than healthy prisoners.

Parole.—Says Major Davis:

> A parole is a promise, either verbal or written, made by an individual of the enemy by which, in consideration of certain privileges or advantages, he pledges his honor to pursue or refrain from pursuing, a particular course of conduct.
>
> Paroles are ordinarily only received from officers, and when necessary are given by officers for the enlisted men of their command. They are accepted from enlisted men only in exceptional cases.

In case the government to which the individual belongs refuses to allow or recognize parole, it is the duty of the paroled person to return to captivity. Paroles lose their binding force only upon exchange or at the termination of the war. A breach of parole is a breach of faith and an offense against the laws of war which may be punished with death.

Safe conducts and safeguards.—Safe conduct is a pass given to an enemy subject or an enemy vessel by the military or naval commander in chief to pass from one point or place to another. Says Halleck:

> Safeguards are protections granted by a general or other officer commanding belligerent forces for persons or property within the limits of their commands, and against the operations of their own troops. Sometimes they are delivered to the parties whose person or property are to be protected; at others they are posted upon the property itself, as upon a church, museum, library, public office, or private dwelling. * * * A guard of men is sometimes detached to enforce the safety of the persons and property thus protected. Such guards are justified in resorting to the severest measures to punish any violations of the safety of their trust.

When a safeguard is given in the form of a guard of men, or a detachment, they are considered to be exempt from attack or capture by the enemy.

Pillage; foraging.—The code of the *Institut de Droit International* for wars on land forbids the destruction of public or private property unless such destruction be commanded by urgent military necessity, and also forbids pillage even when places are taken by assault.

Requisitions and contributions may be said to have taken the place of pillage in all well-ordered and disciplined forces.

Foraging consists in the collection by military or naval forces, individually or collectively, of fuel, grain, vegetables, and animals for subsistence or other use. This is resorted to when time does not permit regular requisitions.

Offenses against the laws of war, when committed by authority of belligerents, can be met by reprisals or retaliation, as before mentioned. They can only be resorted to by the express authority of the offended government or the commanders in chief of its forces; they must conform to the laws of humanity and morality, and they should not exceed in kind or degree or mode of application the violation of the laws of war committed by the enemy.

SECTION 46.—EFFECT OF WAR AS TO PROPERTY RIGHTS.

We have seen that the general practice is to permit alien enemies to remain in the country during the war; it is also the practice to exempt their property from seizure, and if they return to their own State to allow them to take their property with them. Formerly, it was quite different; the individual was seized as a prisoner and his property was confiscated. As late as 1814, in the case of Brown *v.* The United States, the Supreme Court of the United States held that by the strict law of war the property of an enemy, if found on land within the country at the outbreak of war, might be confiscated, but it was not the practice, and debts due to citizens of the enemy were subject to the same rule.

The Confederate Congress in 1861, by an act, confiscated property of whatever nature, except public stocks and securities, owned by citizens of States loyal to the Union. By a decision of the Confederate attorney-general this sequestration was extended to debts due to all persons who were domiciled in the Northern States, whether they were citizens of the United States or not. This is the only recent instance in which private debts have been so confiscated.

After a full examination of the authorities and decisions on this question, Chancellor Kent says:

> We may, therefore, lay it down as a principle of public law, so far as the same is understood and declared by the highest authorities in this country, that it rests in the discretion of the legislature of the Union, by a special law for that purpose, to confiscate debts contracted by our citizens and due to the enemy; but, as it is asserted by the same authority, this right is contrary to universal practice, and it may, therefore, well be considered as a naked and impolitic right, condemned by the enlightened conscience of modern times.

Property of the enemy found afloat in ports at the breaking out of war was generally confiscable as prize until a very recent time. But here, too, later practice would seem to have discarded the harsher rule.

Dana says upon this point:

> The course pursued by these nations in the Crimean war, and the fact that nearly all nations now have treaties stipulating for time for removal of vessels and other property in case of war, go far toward creating that change of practice which ultimately changes the law of nations.

The practice in regard to merchant vessels in ports of an enemy became even more liberal at the outbreak of the Franco-German war in 1870 and the Russo-Turkish war in 1877. In 1870 German vessels that had begun to load upon the declaration of war were allowed to enter and discharge in French ports and proceed back under a safe conduct to a home port. In 1877 Turkish vessels were permitted to remain in Russian ports until they had finished loading cargo and to depart with freedom afterwards.

Halleck says, as to English usage in the past:

> While the English text writers and jurists have contended for the right to seize and sequestrate the property of an alien enemy found in British territory at the declaration of war as a right conceded by the law of nations, they have almost uniformly denied the right to confiscate debts due to such enemy, on the ground that

usage and custom have annulled that right. The distinction thus attempted to be drawn between debts and other property is not well founded in reason or authority, but has resulted, apparently, from policy and interest.[1]

Says Woolsey:

With regard to the shares held by a government or its subjects in the public funds of another, all modern authorities agree, we believe, that they ought to be safe and inviolate. To confiscate either principal or interest would be a breach of good faith, would injure the credit of a nation and of its public securities, and would provoke retaliation on the property of its private citizens.

In respect to property that is immovable, such as lands and houses, belonging to a subject of the enemy and located within the limits of the other belligerent, the general rule of civilized States seems well settled that such property is not to be confiscated. This is founded upon the principle that the State, by permitting these persons—aliens—to purchase and possess such property, comes under an implied pledge to protect them in the possession. Phillimore says in case the income of the estate is sent out of the country to augment the private or public resources of the enemy it may be confiscated during the continuance of the war without any breach of international usage.

It is the established rule and usage that property of the subjects of the enemy found upon the high seas or in the ports or territorial waters of the enemy is, in time of war, subject to capture and confiscation as prize of war. This is modified, so far as the powers who have acceded to the declaration of Paris are concerned, by the rule which it provides for the exemption of the goods of an enemy from capture, if not contraband of war, when covered by the flag of a neutral power.

Section 47.—Effect of War upon Contracts and Treaties.

Contracts entered into between enemies, that is, between the citizens of two States at war, are void absolutely. Ransom contracts form a well-known exception to this rule.

Of contracts between such persons, made before the outbreak of war, some are annulled by the war and some are simply suspended during the war and revive in full force at its close. In the first class are executory contracts, and those especially which would necessitate some intercourse with the enemy, such as partnerships, insurance policies, and contracts for the performance of work, as the building of a ship or house. On the other hand, contracts of debt, as they are called, where there is nothing left to be done except to pay money, are merely suspended, though neither interest nor the statute of limitations runs during the war.

Analogous to these private contracts are treaties between the belligerent States. Treaties which are fully executed, such as cessions of territory, are not affected by the war, but treaties of commerce or treaties granting privileges are abrogated by the war.

Section 48.—Trade with the Enemy.

The effect of war is to put a stop to all trade with the enemy. It is illegal unless especially permitted by the sovereigns.

In the general prohibition of trade with the enemy is included all business communication across the hostile lines. Thus, if a citizen of

[1] There is, however, a difference, that property may be serviceable to the enemy in carrying on the war; whereas mere debts, the collection of which is legally postponed till the restoration of peace, have not that quality.

one of the belligerent States possesses property within the other State, he can neither appoint an agent after the outbreak of war to care for his property nor send orders to one appointed before the war. A consequence of this prohibition is the right to confiscate merchandise which is the object of this traffic, and if the attempt is made afloat the penalty extends to the ship and cargo.

It has been well said that a political war and a commercial peace are inconsistent. Dana says:

> The truth is, the most humane and often the most efficient part of war is that which consists in stopping the commerce and cutting off the material resources of the enemy. If cutting off our commerce with him and his with us cripples and embarrasses him, it must be done. * * * It takes no lives, sheds no blood, imperils no households, has its field on the ocean, which is a common highway, and deals only with persons and property voluntarily embarked in the chances of war for the purposes of gain and with the protection of insurance.

But licenses to trade may be granted in certain cases by the sovereign authority.

During the civil war of 1861 Congress authorized the President to grant licenses in certain cases; but the Supreme Court held that a license granted by the collector of New Orleans to bring cotton out of the Confederate lines, although it was approved by General Banks and countersigned by Admiral Farragut, was not a legal license. It must be specially authorized by the President. The license issued by one State or belligerent does not bind the other State.

In the year 1811 England granted 8,000 licenses to trade with the enemy, and by order in council of April 15, 1854, during the Crimean war, Great Britain also granted permission to her subjects to trade freely to unblockaded Russian ports in articles, not contraband, carried in neutral bottoms. A like policy was also adopted by France and Russia. Says Halleck:

> A license to trade with a port of the enemy does not serve as a protection for a breach of blockade in case the port is blockaded; nor does it afford any protection for carrying goods contraband of war, enemy's dispatches, or military persons, or for a resistance of the right of visitation and search; in fine, it can cover no act not expressly mentioned in the license or implied as a means necessary for its execution.

Ransoms, etc.—According to Halleck:

> The term *ransom* is now usually applied to property taken from an enemy in war and surrendered or restored to the owner on the payment of, or agreement to pay, a specified sum of money, which is called ransom money.

The agreement is usually made in writing, in duplicate, one copy being retained by the captor, which is generally known as the ransom bill, and the other copy in the possession of the captured vessel constitutes its safe conduct. Practically, a ransom is a repurchase of a prize by the original owners, and under it the crew are also released instead of becoming prisoners of war. The captor used to keep an officer of the prize as a hostage for payment, in addition to the ransom bill. Says Wheaton:

> If the ransomed vessel is lost by the perils of the sea before her arrival, the obligation to pay the sum stipulated for her ransom is not thereby extinguished. * * * Even where it is expressly agreed that the loss of the vessel by these perils shall discharge the captured vessel from the payment of the ransom, this clause is restrained to the case of a total loss on the high seas, and is not extended to shipwreck or stranding, which might afford the master a temptation fraudulently to cast away his vessel, to save the most valuable part of the cargo and avoid the payment of the ransom. * * * So, if the captor, after having ransomed a vessel belonging to the enemy, is himself taken by the enemy, together with the ransom bill, of which he is the bearer, this ransom bill becomes part of the capture made by the enemy; and the persons of the hostile nation who were debtors of the ransom are thereby discharged from their obligation. In England ransom has at times been forbidden; in France it is permitted for vessels of war, but restricted as to

privateers; Spain allows it after three prizes have been taken by privateers, while Russia, Sweden, Denmark, and the Netherlands forbid it altogether. The United States permit the practice of ransom under all circumstances.

Section 49.—Commercial Domicil.

With respect to property rights the character of enemy is not limited to the citizens of an enemy State. Property liable to capture at sea takes its enemy character from the residence of its owner, rather than from his nationality. If he has domicil in a belligerent country his property found upon the sea is enemy property, although he be a citizen of a neutral country or of the other belligerent State; and, on the other hand, if a citizen of a belligerent State is domiciled in a neutral country his property found on the sea is neutral property. In such a case a man is said to have a commercial domicil in the country where he resides and is engaged in commerce; but a merchant who has a house of trade in a belligerent country, though he may reside in a neutral State, is, in so far as his property with that house is concerned, a belligerent.

The French rule in this, as in many other cases, is different in a very essential respect from that of the United States and Great Britain. It is that wherever a man may have his domicil his national character impresses itself upon his property. This question of national domicil in time of war is wholly connected with property found upon the sea, and would have little importance if private property were exempt from capture in maritime war.

Time is the principal element in constituting domicil. In most cases it is conclusive evidence. Furthermore, the presumption with regard to domicil is that the party is there *animo manendi*, and it is for him to explain if he seeks to avoid the consequences of the presumption. The captors are not bound to prove that his place of residence was his actual domicil; but for the redemption of his property he must give such evidence as to his intentions in regard to residence as will disprove the presumption of domicil.

It has been established also that the produce of the enemy's soil is to be considered as hostile property so long as it belongs to the owner of the soil, whatever may be his national character in other respects, or wherever may be his place of residence.

Though generally the property of a house of trade established in an enemy's country is considered liable to capture and condemnation, this rule does not apply to cases, at the outbreak of the war, of persons who have habitually carried on trade in the enemy's country, though non-resident, and who have not had time to withdraw from such trade. If, however, a person commences such a trade connection or continues it during the war, or if the trade should be of such a nature as to constitute a special relationship between the merchant and the belligerent State, he can not protect himself by his neutral residence.

As an example of the latter, may be mentioned the case of an American citizen possessing a tobacco monopoly in Spanish territory, who, though a nonresident and transacting his business through an agent, was held to have contracted a Spanish mercantile character.

The Supreme Court of the United States has held that the share of a partner in a neutral house is *jure belli* subject to confiscation where his own domicil is in a hostile country.

Section 50.—Merchandise in Transit on the Sea.

The right to capture the property of the enemy at sea has led to the larger part of the rules of international law connected with maritime cases.

(1) *Goods shipped during war, or in contemplation of war, are at the risk of the consignee during transit.*—When a war breaks out between two maritime States having large commerce, merchants of both belligerents will naturally resort to all possible means to protect their property from capture. The most common method, perhaps, is to make it appear that their goods, while in transit on the sea, belong to neutrals. In time of peace merchants residing in different States in shipping goods over the ocean may make any contract they choose with respect to the risk during the transit; they may agree that the title may remain in the name of the shipper or in that of the consignee.

The ordinary custom of merchants has always been that goods delivered to the master of a ship are held to be delivered to the buyer or consignee. In time of war prize courts will not permit any variation from this custom. Otherwise the dealings between belligerents and neutrals would be so arranged that goods in transit on the sea would always belong to neutrals in order to avoid capture.

By the French rule the neutral shipper may assume the risk of goods in transit to an enemy country. This rule, notwithstanding the Declaration of Paris, to which France was a party, is still of some effect. It determines whether goods under an enemy's flag are neutral or enemy. Enemy's goods, by the Declaration of Paris, are still liable to capture if under an enemy flag, while neutral goods are not unless they are contraband of war.

Merchandise shipped to become the property of the enemy on arrival, if taken in transit, is to be condemned as enemy's property, by the rulings of English prize courts. If it had been contracted to become the property of the enemy only upon delivery, the capture is considered as delivery.

(2) *Transfer in transit and stoppage in transit.*—According to the rules of the English and American prize courts, property hostile at the time of shipment can not change its character during transit by a sale to a neutral. Goods belonging to a belligerent, already in transit at the breaking out of the war or even when war is imminent, are not allowed to be transferred; that is, sold to a neutral during transit. A transaction of this kind is held to be the same in principle as a transfer in transit during war.

Says Sir William Scott:

> The nature of both contracts is identically the same, being equally to protect the property from capture in war, not indeed in either case from capture at the present moment, but from danger of capture when it is likely to occur. The object is the same in both instances, to afford a guaranty against the same crisis; in other words, both are done for the purpose of eluding a belligerent right, either present or expected. Both contracts are framed with the same *animo fraudandi* and are, in my opinion, justly subject to the same rule.

Although the character of property is not permitted to be changed during transit so as to exempt it from capture and confiscation, nevertheless, says Halleck:

> If it be neutral or friendly at the commencement of the voyage, its character may be so effectually altered before its termination as to insure its condemnation. As a general rule, no matter what its character at the commencement of the voyage, if its owner is an enemy at the time of the capture, the seizure is lawful and confiscation a necessary consequence.

In the case of an owner formerly domiciled in a belligerent State who departs with his property for his native country to remain there, there seems to be a just exception to the rule that there can be no change in the hostile character of property in transit by a change in the national character of the owner. Says Halleck:

Every consignor, not only at common law, but by a rule of the general mercantile law, has in certain cases a control over the shipment which is technically called a right of stoppage *in transitu;* that is, a right to countermand the bill of lading and repossess himself of the goods at any time after their shipment and before their arrival at their destined port. The only case in which this right of stoppage *in transitu* can be legally exercised under the laws of war is, in the expectation, confirmed by the event, of the insolvency of the consignee. * * * The effect of this right when duly exercised is to save property from its liability to capture where the consignment is made from a neutral to an enemy, and to incur that liability when the consignment is made from an enemy to a neutral.

(3) *Freight, recapture, and rescue.*—When a neutral vessel carrying enemy's goods is captured, the neutral master is, as a general rule, entitled to his freight money, which is a lien upon the cargo. The freight money is due the captor, however, in case the captured ship is a lawful prize, when the neutral cargo is carried by the captor to the place of destination.

As to recapture Wheaton says:

As to the ships and goods captured at sea, and afterwards recaptured, rules are adopted somewhat different from those which are applicable to other personal property. These rules depend upon the nature of the different cases to which they are to be applied. Thus the recapture may be made either from a pirate, from a captor clothed with a lawful commission, but not an enemy, or lastly from an enemy.

The provisions as to recapture under the municipal law of the United States are to be found in Section 4652 of the Revised Statutes of the United States. It adopts the rule of restoration to the original owner, with salvage, at any time before condemnation by a competent tribunal.

Restitution with salvage, and under varying conditions, is made by Great Britain, the United States, Portugal, Denmark, Sweden, Holland, France, and Spain.

It may be considered settled by the case of the *Emily St. Pierre* during the civil war, and by the case of the brig *Experience* in 1800, that a neutral government is not required by executive action to restore a private vessel of one of its citizens which has been recaptured before condemnation to the government of the captors.[1]

Section 51.—Transfer of Flag from Belligerent to Neutral.

We are now brought to the important question, May the merchant ships of a belligerent, a class of private property, be transferred to a neutral during war, or even when war is imminent?

The Declaration of Paris making free ships free goods with the exception of contraband of war, has doubtless had the effect to increase the tendency to transfer belligerent merchant ships to a neutral flag, for the ships could then continue their commerce with impunity. This tendency will probably increase in future maritime wars by the building of so many swift cruisers—commerce destroyers—which take the place of privateers.

The English and American prize courts hold in respect to the transfer of enemies' ships during war that purchases of them by neutrals are not, in general, illegal; but such purchases are liable to great suspicion and should be subject to the most searching inquiry. Halleck lays down the following rule:

The sale of an enemy's vessel to a neutral purchaser, to be valid, must in all cases be absolute and unconditional. The title and interest of the vendor must be completely and absolutely divested. If there is any covenant, condition, agreement, or even tacit understanding by which he retains any portion of his interest, the entire contract is vitiated, and in international law regarded as void. Thus, if the vendee is bound by a condition to restore the vessel at the conclusion of the war; or if the

[1] See Snow's Cases, p. 361.

vendor retains a lien on the vessel for a whole or a part of the purchase money, the transfer is held to be colorable and void. Even when the sale is ostensibly absolute, if the vessel continues under the control and management of her former owner and in the same trade and navigation in which she was previously employed, these circumstances are deemed conclusive evidence of a fraudulent intent to cover under the name of a neutral the property of an enemy, and the contract is necessarily adjudged to be invalid. * * * So also if the neutral vendee, although residing himself in a neutral country, continues to employ the vessel constantly in the trade of the country to which she belonged.

The inference from these circumstances is that the transfer was solely to carry on the trade of the enemy without liability to capture and was thus a fraud on belligerent rights. We find that here again the French rule differs somewhat from that of England and the United States.

France, in view of the difficulty of detecting the fraud in such transfers of ships, refuses absolutely to recognize their validity, the presumption in all cases being that the transfer is fraudulent. While England and the United States admit proof to the contrary, France does not. This has been the French rule for over two hundred years.

During the Crimean war, the French rule was applied in two cases, which illustrate the kind of transaction attempted by belligerents. One was the case of a Russian ship transferred to the Tuscan flag by a fictitious sale, with a false date, anterior to the outbreak of the war, and changing the name of the vessel from *Orio* to *Orione*.

The other was the case of a Russian vessel sold at Elsinore by the master of the vessel without the authority of the owners to a Danish subject after the outbreak of the war was known. In both cases the ships were confiscated.

During the same war the English prize court was nearly as strict in enforcing the rule, and in the case of the *Christiana*, a Russian vessel sold to neutrals, condemned the ship, because the sale was adjudged fictitious. Any doubt is generally ruled against the vessel.

The transfer of vessels sailing under the Chinese flag to American ownership and flag in the Franco-Chinese imbroglio in 1884–85 opened an interesting question. By this transfer the vessels became American property, but not documented vessels of the United States. They are, as other floating pieces of American property, such as a raft of logs with a flag, etc., entitled to the protection of the naval service of the United States; but ships in international law are something more than mere property. They are engaged in international trade; they carry passengers and goods, and in time of war may be engaged in carrying contraband of war, or enemy persons or dispatches; and yet in the case here in question they have not a single paper required by the rules of international law, except the certified bill of sale as evidence of ownership.

Long practice and departmental decisions have properly fixed the right of vessels, foreign built and American owned, to bear the flag under certain restrictions; but how far this will protect them against a first-class power as a belligerent is yet to be tested. In the case of transfer of the Chinese vessels to American purchasers, the French at that time declared that a state of war did not exist, though afterwards they were obliged to assume the position of belligerents.

Mr. Justice Nelson said, with reference to vessels of somewhat similar character, that "they are of no more value as American vessels than the wood and iron out of which they are constructed;" and Mr. Justice Miller, of the Supreme Court, said in a more recent case that "in a foreign jurisdiction or on the high seas they can claim no rights as American vessels."

The vessels transferred to the American flag in China never came to American ports, and if we add, as appears to be the case, that the owners were domiciled in China, it is difficult to see how the American flag could protect them from capture by an enemy of China. According to the rule of domicil it makes no difference whether they are owned by citizens of China or by American citizens domiciled in China, so that in this particular case the transfer made no difference.

In similar circumstances the English and American prize courts would unquestionably condemn them. But as the French look to the national character rather than the domicil of the owner they would regard these ships as American and neutral if the incident of transfer were overlooked.

In connection with the subject of vessels of the United States and their rights in general, it may be said that Congress does not recognize these unregistered vessels except as mere property; and the Executive has appealed to that body in vain for some regulation by which they may obtain a fixed status. The vessels transferred to a foreign flag during the civil war were expressly prohibited by act of Congress of February 10, 1866, from reassuming their character as vessels of the United States, except by act of Congress especially authorizing the registry. Yachts built abroad come under a special category, as mentioned in a previous chapter.

Chapter VIII.

Military Occupation; Termination of War; Postliminium.

Section 52.—Property of Enemy in His Own Country.

When the territory of a country is invaded by a foreign army, the question arises as to property that may be seized by the invader for his own use.

In regard to the public property of the enemy in his own country it may be given as a rule that the movable or personal property belonging to the State may be confiscated, such as warlike stores, the treasure of the State, moneys, etc., the plant of the State railways and telegraphs, and the customs duties and other taxes. Works of art, the contents of museums and libraries, and the archives of the State, are exempt from this rule.

A notable disregard of this rule was the action of Napoleon I. in seizing the famous pictures and statuary of the countries which he conquered. They were restored by the allies in 1815.

At sea public vessels engaged in explorations and scientific research are also exempt from capture and condemnation.

Real property, lands and buildings belonging to the State, can not be taken away or sold; but the invader may seize the profits accruing from such real estate, or use the property temporarily for his own purposes.

Private property.—In the case of property of private persons, the rule, as we have seen, is that it is not subject to seizure and confiscation; but this rule is subject to the important exception of requisitions and contributions.

Requisitions consist in the levying upon articles needed for the consumption or temporary use of the army or naval force. Such articles may consist of food for men or animals, clothes, coal and other fuel, wagons, horses and mules, railway materials, steamers, boats and other means of transportation, naval material, and of skilled and unskilled workmen for various purposes. It is stated that in the Franco-German war this was extended to beer for the men and tobacco and wine for the officers.

Contributions consist of money payment demanded of towns or districts, either in line of requisition or by way of fine, and may be exacted only by the commander in chief or by generals commanding detached corps acting independently.

Receipts are given, as a rule, in acknowledgment of the quantities or sums received in order that they may not be exacted a second time from the same persons and in order that the inhabitants may recover the amounts paid the enemy from their own government if, after the war, it chooses to reimburse them. This, however, is not ordinarily done, and the individuals who have suffered must bear the loss as one of the casualties of the war. In 1871 the French Government did appropriate 100,000,000 francs to be distributed among those that had been most impoverished by the German invasion.

In some cases generals commanding an invading army have refrained from requisitions on the ground that it was bad policy from a military point of view. They found that they could provide subsistence for their armies much better by paying for the articles needed.

Wellington in invading France in 1813, General Scott during the war with Mexico, and the allies in the Crimean war, followed this method. But the reasons were largely military or political and not wholly from motives of humanity toward the people of the invaded territory.

On one occasion during the Franco-German war the Germans at Nancy made requisition for 500 workmen to build bridges, and, as they were not forthcoming at the time specified, the following order was issued: "If to-morrow, January 24, at noon, 500 workmen are not present at the railway station, the overseers first and then a certain number of workmen will be seized and shot on the spot." Generally in this war the right of levying requisitions was put in force with more than usual severity.

Hall says upon this question:

> As the contributions and requisitions which are the equivalents of compositions for pillage are generally levied through the authorities who represent the population, their incidence can be regulated. * * * At the same time, if they are imposed through a considerable space of territory, they touch a larger proportion of the population than is individually reached by most warlike measures, and they therefore not only apply a severe local stress, but tend more than evils felt within a narrower range to indispose the enemy to continue hostilities.

There is but little doubt that the use of these exactions on a large scale tends to shorten wars, even though the severity of the weight of the contributions may be postponed until after war is over by an assumption of the obligation by the local authorities.

It is stated that a syndicate of bankers was formed during the Franco-German war for the purpose of advancing money to towns unable to meet requisitions and contributions, and that 4,000,000 francs were advanced to the town of Nancy alone through this channel.[1]

During the civil war in the United States the War Department, by an order dated July 22, 1862, directed that the military commanders within the States of Virginia, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas, in an orderly manner seize and use any property, real or personal, which might be necessary or convenient for their several commands, as supplies or for other military purposes, and while such property might be destroyed for military objects, none should be destroyed in wantonness or malice. This was followed by an order from the Confederate Government of August 1, 1862, threatening retaliation.[2]

SECTION 53.—CHARACTER OF JURISDICTION OF THE INVADER OVER TERRITORY OCCUPIED.

At the conference of Brussels in 1874 the majority of the delegates adopted a resolution that:

> A territory is considered as occupied when it is actually placed under the authority of the hostile army. The occupation only extends to those territories where this authority is established and can be exercised.

In the discussion of this article it was said with reason that occupation of a military nature was similar to a blockade, to be exercised and

[1] Edwards, Germans in France.
[2] Glass, International Law.

recognized only when and where it is effective. It was urged, and especially by the representatives from the smaller States, that greater power should not be accorded to the invader than actually possessed by him. He should be always in sufficient strength to repress outbreaks at once, and furthermore, if these could not be suppressed and the territory freed itself, it then ceased to be occupied. Hall says:

> An invader may, therefore, fairly demand to be allowed to retain his rights of punishment within the district indicated until the enemy can offer proofs of success solid enough to justify his assertion that the occupier is dispossessed. This requirement might probably be satisfied, and at the same time sufficient freedom of action might be secured to the invaded nation, by considering that a territory is occupied as soon as local resistance to the actual presence of an enemy has ceased, and continues to be occupied so long as the enemy's army is on the spot, or so long as it covers it, unless the operations of the national or an allied army or local insurrection have reëstablished the public exercise of the legitimate sovereign authority.

These definitions are not in accord with either the theories or practice of the German authorities and writers. During the Franco-German war in 1870 the German armies, by a system of terrorism, by operations in the nature of flying columns or raids, and by threats and penalties, held nominal occupation over territories much beyond the immediate control of their troops.

The tendency of opinion in modern times, with the exception just mentioned, seems much more in favor of requiring the occupation to be actual and not constructive.

The rules in force with the armies of the United States during the latter part of the civil war prescribed that a place or district occupied stands under the military authority of the occupying army, whether any proclamation or warning to the inhabitants has been issued or not.

The immediate and direct effect of occupation of any portion of the enemy's territory is the suspension of all authority derived from the enemy's government within the occupied district. The judicial and administrative agents of the former government may be retained in their functions at the will of the commander, in which case they are answerable to the latter for the discharge of their duties, and are usually put under oath to do nothing detrimental to the interests of the invading force.

In our jurisprudence the system thus established by an invading force is called military government. Such a government is peculiar in that it is subject to no constitutional or legal restraints other than those imposed by international law and the usages of war. The former laws of the region so far as they relate to the exercise of public functions are of no validity against the invader. On the other hand, as the occupied territory lies without the bounds of the nation to which the occupying army belongs, neither the constitution nor the ordinary laws of that nation can have validity there. The result is that the declared will of the commander, tempered with the humane sentiments of the times and the established practices of civilized warfare, must be regarded as having the force of law within the occupied territory.

According to the rules under which the armies of the United States operate in such a contingency the military government is expected to be less stringent in places and countries fully occupied than in regions where actual hostilities exist or are expected.

It is also provided that civil and criminal law shall continue in operation unless interrupted by order of the military authority.

It is now considered by most modern writers upon the subject that the occupation by an invader, being, as it were, only an incident of the hostilities, brings no permanent change in the national character or allegiance

of the population of the occupied territory. The relation existing between this population and the invader is not one of allegiance, but of constrained obedience, and this state of affairs exists only so long as the invader is able to compel such obedience. Says Major Davis:

> If the ordinary laws of the country or any of them are permitted to exist, and if the courts are permitted to administer them, they do so at the pleasure of the commanding general. No guaranties, constitutional or otherwise, are effective against his will, and his consent to their existence or execution may be withdrawn at any time. The occupation is military, not civil, and the invader, in carrying on his government, is controlled by various considerations, among which, from the necessities of the case, those of a military character are likely to prevail.

Although the rights acquired by occupation put the invader in temporary possession of the sovereignty of the territory, he is not justified, unless he proposes a permanent retention of the country, in making any political or constitutional changes in the form of the civil government.

Neither would it be proper, under ordinary circumstances, to change or suspend laws affecting property and private relations or the good order, morality, or religion of the country. Any acts of this kind on the part of the invader become null and void when his occupation ceases.

It has been decided by the Supreme Court of the United States that during the occupation of Castine, Me., by the British in the war of 1812 it ceased for the time to be a port of the United States, so far as the revenue laws were concerned.

As to the ports in Mexico held by the United States during the war with Mexico, the same court at a later date held that these ports, so far as importations into the United States were concerned, were foreign territory.

The ground upon which this decision was based was that, though these ports were in exclusive possession of the United States through its military and naval forces, still they had not been incorporated into the Union as a portion of its territory by any act of the treaty-making or legislative power. It was admitted, however, by the court that so far as the citizens or subjects of foreign States were concerned, these ports were territory of the United States.

As to the government of the invading State, Halleck says:

> Neither the civil nor the criminal jurisdiction of the conquering State is considered in international law as extending over the conquered territory during occupation. Although the national jurisdiction of the conquered power is replaced by that of military occupation, it by no means follows that this new jurisdiction is the same as that of the conquering State. On the contrary, it is usually very different in its character and always distinct in its origin.

Ortolan refers in this connection to the case of Villasseque, a Frenchman charged with assassination in the Province of Catalonia, Spain, during French military occupation. The French court of appeals decided that this occupation and this administration by French troops and French authorities had not communicated to the inhabitants of Catalonia the title of Frenchmen, nor to their territory the quality of French territory; this communication could result only from an act of union emanating from the public authority, which never existed.

The same view was held by the Attorney-General of the United States with respect to crimes committed in Mexico during the military occupation of that country by the United States.

Military occupation being obtained by force, and obedience to its authority being an act of constraint, the obligation to obey ceases when this constraint can be thrown off. The right of armed resistance to the authority of the invader is correlative to the right of the invader to govern the occupied territory by force of arms. Such resistance or

revolt is made at the risk of those who take up arms, and the penalties in case of failure are generally severe. The right, therefore, is not a legal one. It is somewhat analogous to the right of rebellion against an arbitrary and oppressive government, a right of appeal to force against force, with the risks attending the exercise of the right.

Hall says, in discussing this phase of occupation:

> The invader succeeds in a military operation, in order to reap the fruits of which he exercises control within the area affected; but the right to do this can no more imply a correlative duty of obedience than the right to attack and destroy an enemy obliges the latter to acquiesce in his own destruction. The legal and moral relation, therefore, of an enemy to the government and people of an occupied territory are not changed by the fact of occupation. He has gained certain rights, but side by side with these the rights of the legitimate sovereign remain intact. The latter may forbid his officials to serve the invader, he may order his subjects to refuse obedience, or he may excite insurrections.

It has been stated above that such insurgents usually meet with severe penalties. In the instructions for the armies of the United States of 1863, they are called war rebels, and are defined as persons within an occupied territory who rise in arms against the occupying army or against the authorities established by the same. The penalty given is death, whether the offenders be captured singly or in bands, and whether their action be incited by their own government or not.

It can not be said that the present prevailing opinion sanctions the severity of the penalty thus adjudged by these instructions. The paragraph in the code recommended by the *Institut de Droit International* in 1880, based upon that adopted by the Brussels conference, reads as follows:

> The population of the invaded district can not be compelled to swear allegiance to the hostile power; but individuals who commit acts of hostility against the occupying authority are punishable.

This, though indefinite, is less vigorous than the article contained in our instructions of 1863.

A war traitor is defined by our instructions as a person in a district under martial law who gives information to the enemy. Such an offender is made liable to the punishment of death if he betrays any information concerning the plans, safety, condition, or operations of the troops holding the district. The offense is too similar to that of a spy to cause any serious objection to the penalty mentioned.

So, too, the extreme penalty, as a matter of self-preservation, may be said still to exist in the case of persons who serve as guides to any force intended to operate against the occupying army, or who intentionally mislead the officers of that army when serving them as guides, or who destroy telegraphs, roads, canals, or bridges used by them, or set fire to the barracks or quarters of the soldiers. It is not necessary that the extreme penalty be carried out in every case, though the right to award it should be retained.

Naturally, the invader has the right of preventing his enemy from obtaining help from the resources of the occupied territory. This may require a commercial blockade along the boundaries of the occupied area and measures to prevent the inhabitants from joining the armies of their legitimate government.

It follows, of course, that the invader can use the material resources of the country occupied to further his own success in the war. But this does not give him the right to take the property or services of unoffending residents without compensation. Nor does the right of demanding service extend to the military service of the inhabitants.

It would not be just or proper to compel the inhabitants to serve in the army of the invader against their own country, or to force them to

construct or assist in the construction of works of attack or defense against the legitimate government.

No unnecessary damage should be done to public or private property, and private property should be respected, whether belonging to individuals or corporations, unless needed for transportation, sustenance, or other military necessities. It is only when the military occupation becomes a completed conquest that the invader can collect the debts due to the displaced government.

SECTION 54.—ARMISTICE AND TRUCE.

The expressions armistice, truce, and suspension of arms are used indiscriminately for various forms and periods of cessations of hostilities.

It seems proper, however, to adopt the following definition of Halleck, who says:

> If the cessation is only for a very short period, or at a particular place, or for a temporary purpose such as for a parley, or a conference, or for removing the wounded and burying the dead after a battle, it is called a suspension of arms.

This agreement can be made by the officers immediately in command of the opposing forces, or even by commanding officers of detachments, but the compact extends only to the forces under the command of the contracting parties.

An armistice may be defined as the cessation of hostilities over a more extensive field and for a longer period of time. It should be agreed upon in writing, and be ratified by the supreme authority on each side. Says Halleck:

> A general truce applies to the general operations of the war, and whether it be for a longer or shorter period of time, it extends to all the forces of the belligerent States and restrains the state of war from producing its proper effects, leaving the contending parties and the questions between them in the same situation in which it found them. * * *
>
> Such a general suspension of hostilities can only be made by the sovereignty of the State, either directly or by authority especially delegated. Such authority not being essential to enable a general or commander to fulfill his official duties, is never implied, and, in such a case, the enemy is bound to see that the agent is especially authorized to bind his principal.
>
> A truce binds the contracting parties from the time of its conclusion, unless otherwise especially provided, but it does not bind the individuals of the nation so as to make them personally responsible for a breach of it until they have had actual or constructive notice.
>
> If, therefore, individuals, without a knowledge of the suspension of hostilities, kill an enemy or destroy his property, they do not by such acts commit a crime, nor are they bound to make pecuniary compensation; but if prisoners are taken or prizes captured, the sovereign is under obligation to immediately release the former and to restore the latter.

General truce is often preliminary to negotiations for peace. Such a general truce was concluded January 28, 1871, between the French and German authorities, and with some special exceptions covered the military operations between the German and French armies, who were obliged to retain their respective positions.

This general truce or armistice applied equally to the naval forces of the two countries, the meridian of Dunkirk being adopted as the line of demarcation; the French naval force being obliged to remain to the west of this line, while any German vessels of war to the west of this line were obliged to return to the eastward as soon as they received notice. All captures made after the conclusion and before the notification of this general truce were to be restored to the original owners,

as well as all prisoners made during the interval just mentioned upon either side. This truce, made for twenty-one days, was prolonged until the 12th of March, and was preliminary to the conclusion of peace.

During a general truce, though hostilities cease, each party may in its own jurisdiction do with its armed forces whatever it could do in time of peace. Fortifications can be built or put in order, vessels built and fitted out, troops raised and trained, and warlike stores of all kinds manufactured and collected. Troops can be moved about from one part of the country to another, with the exception of the actual area of hostilities, and ships can be sent abroad and brought home.

In an armistice or special truce the two belligerents should refrain from all military operations directly or indirectly of a hostile nature which could only have been carried on under fire.

Any act which could have been done without regard to the enemy during hostilities may continue to be done during an armistice.

As to the provisioning of a besieged place, as previously mentioned, this should be arranged for by an agreement between the two parties. In a general way, except as indicated above, matters should be so carried on during an armistice as to find both belligerents in precisely the same position in which they were when it began. Nelson's action at Copenhagen during the armistice, and especially during the suspension of hostilities preparatory to the agreement as to the armistice, could not be received as a safe precedent at the present day.

Unless otherwise arranged it is, as a rule, considered that the prohibition of general intercourse, both commercial and personal, which exists during the war should remain in force during an armistice.

SECTION 55.—TERMINATION OF WAR.

The great object of war is a satisfactory peace. There are three ways by which a war may be terminated and peace secured.

First, by a cessation of hostilities and the subsequent recognition or reëstablishment of peaceful relations between the belligerents.

Second, by a complete and unconditional submission on the part of one of the belligerents, which may be followed by an absorption of part or the whole of its territory.

Third, by the completion of a formal treaty of peace.

The termination of war by the first way is rare. The war between Sweden and Poland ceased in this way in 1716, and the war between Spain and its American colonies ended in somewhat the same way. In this latter case hostilities had ceased by the year 1825, and it was not until 1840 that intercourse with them had generally begun on the part of Spain. The independence of Venezuela was not recognized until 1850. Later instances are the cases of the war between Chile and Spain, which actually was of short duration, but which had a nominal existence of fifteen years, and the war between France and Mexico, which may be said to have ended in 1867, though the diplomatic relations between the two countries were not reëstablished until 1881.

The disadvantages of this state of affairs, both to belligerents and neutrals, is evident. As the war fades away it is difficult to define its actual termination and the rights and obligations of everybody concerned are in doubt and uncertainty, while the issues which led to the war remain unsettled and may lead in the future to fresh hostilities.

As to the unconditional submission of one belligerent to another, with its consequent extinction or partition, there are many cases in both ancient and modern history. The wars of the French Revolution

and Empire, and the later wars in which Poland and some of the German principalities were absorbed by other States, give examples of this sort.

Geffcken says that, in order to constitute the proper title, the intention and the fact of domination should coincide. The intention is made known by a declaration of incorporation; the fact is shown by the complete inability on the part of the subjected State to oust the power of the other.

Phillimore says as to this way of terminating war:

> The most unconditional submission would be holden, according to the principle of international law, to imply a retention of the common rights of humanity and between Christian States of Christian humanity. Any infringement of these rights would be beyond the moral competence of the conqueror.

The third method mentioned of terminating war is by a formal treaty of peace. The importance of a treaty of this kind requires an application of all the rules and customs relative to treaties in general, and nothing should be neglected to add weight and dignity to such an agreement.

A treaty of peace has been especially defined as an act by which the belligerent governments, taking into consideration the state of their forces, and the results of the war, determine their respective pretensions and convert them into rights and obligations.[1] Such treaties terminating great wars mark epochs in the world's history.

Treaties of peace are valid whether made with the authority which declared the war or with a *de facto* or established government succeeding it. They are obligatory even if made under the stress of military coercion, unless personal violence has been exercised upon the ruler or his representatives. A treaty of peace made with a ruler is not binding upon a nation when he is a prisoner or captive.

A formal treaty of peace is often preceded by a conference which arranges the preliminaries of peace. As these preliminaries which are afterwards developed into a regular treaty contain the essential conditions upon which peace is established, they should be faithfully adhered to in the final treaty.

The preliminaries of Villefranca led to the treaty of Zurich in 1859, and the preliminaries of Versailles led to the treaty of Frankfort in 1871.

Says Wheaton:

> A treaty of peace binds the contracting parties from the time of its signature. Hostilities are to cease between them from that time, unless some other period be provided in the treaty itself. But the treaty binds the subjects of the belligerent nations only from the time it is notified to them. Any intermediate acts of hostility committed by them before it is known can not be punished as criminal acts, though it is the duty of the State to make restitution of the property seized subsequently to the conclusion of the treaty; and in order to avoid disputes respecting the consequences of such acts it is usual to provide in the treaty itself the periods at which hostilities are to cease in different places. * * * When a place or a country is exempted from hostilities by articles of peace it is the duty of the State to give its subjects timely notice of the fact, and it is bound in justice to indemnify its officers and subjects who act in ignorance of the fact. In such a case it is the actual wrongdoer who is made responsible to the injured party and not the superior commanding officer of the fleet, unless he be on the spot and actually participating in the transaction. Nor will damages be decreed by the prize court, even against the actual wrongdoer, after a lapse of a great length of time.

In a civil war which results in the suppression of a rebellion the termination is fixed by some public act of the political department of the Government. In the case of our civil war the President's procla-

[1] Guelle, p. 214.

mation declaring the war had closed marked its termination. As the proclamations included different States at different times it was ruled by the Supreme Court of the United States that the war did not close at the same time in all the States.

Says Wheaton again:

The effect of a treaty of peace is to put an end to the war and to abolish the subject of it. It is an agreement to waive all discussion concerning the respective rights and claims of the parties, and to bury in oblivion the original causes of the war. It forbids the revival of the same war by resuming hostilities for the original cause which first kindled it or for whatever may have occurred in the course of it. But the reciprocal stipulations of perpetual peace and amnesty between the parties does not imply that they are never again to make war against each other for any cause whatever. The peace relates to the war which it terminates, and it is perpetual in the sense that the war can not be revived for the same cause. This will not, however, preclude the right to claim and resist if the grievances which originally kindled the war be repeated, for that would furnish a new injury and a new cause of war equally just with the former.

If an abstract right be in question between the parties, on which the treaty of peace is silent, it follows that all previous complaints and injury arising under such claim are thrown into oblivion by the amnesty necessarily implied if not expressed, but the claim itself is not thereby settled either one way or the other. In the absence of express renunciation or recognition it remains open for future discussion. And even a specific arrangement of the matter in dispute, if it be special and limited, has reference only to that mode of asserting the claim, and does not preclude the party from any subsequent pretensions to the same thing on other grounds. Hence the utility in practice of requiring a general renunciation of all pretensions to the thing in controversy, which has the effect of precluding forever the assertion of the claim in any mode.

All acts connected with the war committed by individuals are protected after the conclusion of peace from all civil or criminal process. This, however, does not extend to suits brought, or ransom bills, or debts contracted by prisoners of war, or to cases of ordinary crimes committed by prisoners of war or by soldiers.

Acts of war done after the conclusion of peace or after the termination of hostilities are null and void, and they must be undone or compensated. Territory which has been captured must be given up, ships taken must be restored, damage from bombardment or loss of market compensated.

In regard to maritime prizes at the termination of war, Calvo considers that ships and cargoes condemned by prize courts before the peace should not be returned, nor give rise to claims of indemnity; but those not condemned at the conclusion of the war should be returned or their value paid. A stipulation to that effect is found in the treaty of Frankfort, which closed the Franco-German war in 1871.

SECTION 56.—POSTLIMINIUM; UTI POSSIDETIS; CONQUEST AND CESSION.

The *jus postliminii* in international law is derived from the fiction of similar title in the Roman law by which persons and, to a less extent, things captured by an enemy were restored to their original legal status when again coming under the power of the nation to which they formerly belonged.

The right of postliminium, so far as international law is concerned, can be said to deal no longer with the restoration of persons, but refers now to the restoration of things, and less to movable things than to real property and territory.

This right is incident to a state of war and belongs exclusively to war. Its tendency is to mitigate the evils of war, as the rule of postliminium requires that property captured by the enemy and recaptured by the fellow subjects or friends of the original owner does not become

the property of the recaptor, but is to be restored upon certain conditions to the original owner. Says Phillimore:

With respect to immovable property captured in war, the established doctrine of international law may now be said to be that the acquisition of it is not holden to be completed before (1) either the territory in which it is situated has by submission, and consequent extinction of its national personality, become incorporated in the possession of the conqueror; or (2), what is a much safer title to the property so acquired, before a treaty of peace has recognized and ratified the possession of the conqueror.

Says Halleck:

Towns, provinces, and territories, which are retaken from the conqueror during the war, or which are restored to their former sovereign by the treaty of peace, are entitled to the right of postliminium, and the original sovereign owner on recovering is bound to restore them to their former state. In other words, he acquires no new rights over them either by the act of recapture or restoration. * * * But if the conquered provinces and places are confirmed to the capturer by the treaty of peace, or otherwise, they can claim no right of postliminium. * * * A subsequent restoration of such territory to its former sovereign is regarded in law as a retrocession and carries with it no rights of postliminium. * * *

But if the subjugated State is delivered by the assistance of another the question of postliminium may arise between the restored State and its deliverer. There are two cases to be considered: First, where the deliverance is effected by an ally, and second, where it is effected by a friendly power unallied. In either case the State so delivered is entitled to the right of postliminium. If the deliverance be effected by an ally the duty of restoration is strict and precise, for an ally can claim no right of war against a co-ally. If the deliverance be effected by a State unallied, but not hostile, the reëstablishment of the rescued nation in its former rights is certainly the moral duty of the deliverer.

There are certain acts done by the invader that must remain good notwithstanding the right of postliminium. Judicial, administrative, and municipal acts, not of a political or military nature, remain good, or otherwise the whole social life of the community would be disorganized. The payment of taxes to the *de facto* government must be recognized, as well as sentences passed upon ordinary criminals; but any punishment for acts directed against the security or control of the invader becomes null and void. While innocent acts done by the invader remain, and the legitimate sovereign can not take steps that are retroactive, all administrative acts of the invader concerning the resources of the State become inoperative from the time of the restoration of the legitimate government. Hall says:

When an invader exceeds his legal powers, when for example he alienates the domain of the State or the landed property of the sovereign, his acts are null as against the legitimate government. Such acts are usually done by an invader who intends to effect a conquest and supposes himself to have succeeded. Whether, therefore, they are valid or invalid in a given instance depends solely upon the strength of the evidence for and against his success.

The acts of the invader that have a political aim, or that change the constitution of the State, cease to be of effect upon the restoration of the legitimate government.

It is no more than just and equitable, however, if the people of a country relieve themselves of the rule of the invader without the assistance of the former government or its allies, that this government should not recover its rights except by the consent of the people. As Bluntschli says, the expulsion of the enemies by the people themselves demonstrates the strength of the nation and the weakness of the government.

Conquest, as distinguished from military occupation, may be defined as that status which a territory taken from an enemy attains when it passes definitely into the hands of the conqueror.

The title, by conquest, of territory may be completed in several ways: by treaty of peace or cession, by subjugation and decree of incorporation and the consent of the inhabitants, or by the inability of the former government to regain control after a sufficiently long period of time has elapsed Says Halleck:

In whatever way the conquest is completed, the institutions of the conquering power usually require some definitive act in order to annex or incorporate the conquered territory so as to complete the conquest and perfect the title. In such cases no alienation to a third party can be made complete till the conquest itself is perfected by such definitive act. Thus, the President of the United States, when war is duly declared, may conquer and take possession of foreign territory, but the joint action of the President and the Senate is required to complete it by treaty, and Congress alone can annex it or incorporate it into the Union. Without such act of treaty confirmation or of lawful annexation or incorporation the title to any conquest made by the United States would still be considered in international law as incomplete.

By the principle of *uti possidetis* which, unless otherwise stipulated, is inherent with all treaties of peace, all property captured during the war is conceded to the possessor. Hence, unless otherwise arranged, all conquered territory remains with the conqueror, and the establishment of peace gives a title so far as other countries are concerned.

Hall mentions that the effects of a contest are to legalize acts done in excess of the rights of a military occupant between the time of the declaration to conquer and its completion, and also to invest the conquering State with all the rights of property and sovereignty and, of course, the corresponding obligations.

It has been, however, usual, as he states, in modern times, to give liberty to inhabitants of a ceded territory to keep their original nationality by withdrawing from the ceded district. As a rule this choice is with the condition that they shall withdraw within a certain period. In the treaty providing for the cession of Alsace and Lorraine those retaining French nationality, though compelled to emigrate, were allowed to retain their landed property in the ceded territory.

It seems well established that, on the conquest or cession of a conquered territory, the laws of the country acquired, especially the municipal laws and usages, remain in force until they are altered by the conqueror or so far as they are not changed by the political institutions of the new sovereignty. This applies to peaceful acquisition as well as conquest, and we have an example in our own history in the retention of the civil law by the State of Louisiana.

The conqueror upon the completion of his conquest acquires all the rights of the original State, such as titles to real estate, movables, and incorporeal property, such as debts.

PART III.

RELATIONS BETWEEN BELLIGERENTS AND NEUTRALS.

CHAPTER IX.

RIGHTS AND DUTIES OF NEUTRALS.

SECTION 57.—BELLIGERENT ACTS NOT PERMISSIBLE IN NEUTRAL TERRITORY.

When war breaks out between two States there is no obligation on the part of other States to issue a proclamation of neutrality; but since the beginning of the nineteenth century it has become customary to do so when a State has commercial interests which may be affected, or in case its ports are likely to be entered by belligerent cruisers.

This practice has several advantages, at least two of them being of considerable importance. In the first place, it calls the attention of its subjects or citizens to the neutrality or foreign enlistment act; and secondly, in very recent years it proclaims the policy of the government toward the belligerents, particularly as to entry and use of its ports and waters by belligerent cruisers.

Good examples of proclamations of this kind were those issued by President Grant at the outbreak of the Franco-German war; the first dated August 22, 1870, and the second October 8 of the same year. The latter treated of the entry and use of ports of the United States, and laid down strict rules, which had become necessary from the previous experience of the United States both as a belligerent and as a neutral State. These rules will probably be promulgated in similar cases in future, as they seem to embody the settled policy of the United States.

The rights of neutrals can be placed under two general heads: (1) That of inviolability of territory. No hostile act should take place within the territory of a neutral, and all of its sovereign rights with regard to its territory should be fully respected. (2) That in all matters of trade, commerce, residence, navigation, etc., the treatment of the citizens or subjects of a neutral State when brought in contact with the belligerents should be in strict accordance with treaty obligations and the rules and usages of international law.

The subjects grouped under the second head will be more properly discussed hereafter in connection with contraband of war, blockade, the right of search, etc.

Concerning the rights of neutral States referred to under the first head, these rights are now mainly connected with the transit of troops, the use of neutral waters as a hostile base of supplies and operations, or hostile acts toward vessels in neutral territory.

So far as the passage of troops of either belligerent across neutral territory is concerned, the neutral State has not only the right, but also the manifest duty of preventing this violation of its territory; no matter if it is attempted by one or both belligerents. The act of transit of troops in war times is a hostile measure, and if permitted would destroy the neutral character of the State permitting it. How indirect measures of this kind may be used by a belligerent to forward hostile movements is illustrated by the attempt made by Germany in 1870 to secure a transit across Belgium.

After the battle of Sedan the German army was so embarrassed by wounded troops that it applied to Belgium for permission to transport the wounded across that country by railway. In this way the route open into Germany could be used for military purposes alone, and the German commissariat in France relieved from the task of feeding the wounded in addition to supplying the active forces. Belgium, after consultation with the English Government, refused the request. Hall says:

> It is indeed difficult to see, apart from the grant of direct aid or of permission to move a *corps d'armée* from the Rhine provinces, in what way Belgium could have more distinctly abandoned her neutrality than by relieving the railroad from Nancy to the frontier from incumbrances, by enabling the Germans to devote their transport solely to warlike uses, and by freeing the commissariat from the burden of several thousand men lodged in a place of difficult access.

During the Franco-Prussian war in 1870 about 60,000 French troops crossed into Swiss territory for safety. They were at once disarmed and interned by order of the Swiss Government. The sick and wounded were retained in Switzerland and the arms of the troops were held as security for the repayment of the cost of subsistence.

When a belligerent uses neutral ports and waters as a base for hostile operations and supplies, as a point to watch the other belligerent, or as an original starting point for hostile expeditions, the sovereignty of the neutral State is constructively if not actually violated. These acts may not involve the use of force, but they place the neutral in the position of aiding and assisting one belligerent by affording him the use of neutral territory in a manner to give him opportunities for hostile acts against the other belligerent. The use of territory in this way provides a base for a belligerent, a base being in a military sense a place where resources and reënforcements can be obtained, from which a force may proceed to take the offensive against the enemy, and in which it finds refuge and protection at need. The essential value of such a base as afforded by a neutral port in modern naval warfare can readily be comprehended.

Nor is it necessary that the ports should be habitually used. Melbourne formed a sufficiently good base to the Confederate cruiser *Shenandoah* during our civil war to enable her after a single stay to carry on a campaign in the North Pacific Ocean against our mercantile and whaling vessels without being obliged to resort to any other port.

A neutral hence has the right to impose such restrictions upon belligerent vessels which come within its jurisdiction as may be deemed necessary for the enforcement of its neutrality, and so long as these restrictions are impartially carried out there is no ground for complaint. This right is exercised at times to the extent of forbidding all armed cruisers, with or without prizes, to enter certain neutral ports and waters for the purpose of obtaining provisions, coal, or repairs.

In 1854 Austria closed the port of Cattaro to belligerent vessels of war. Great Britain did the same as to the the ports and anchorages of

the Bahamas during our civil war, while Sweden, more than once, has closed its five military ports to the cruisers of belligerent nations.

The restrictions and prohibitions imposed by neutrals upon the vessels of belligerents, as to the use of neutral ports, are never extended so far as to deny the hospitality of those ports in case of immediate danger or want, such as stress of weather, want of provisions, etc. Asylum to this extent is required by the ordinary laws of humanity.

By the first proclamation of President Grant, issued August 20, 1870, at the outbreak of the Franco-Prussian war, among the acts forbidden were those of increasing or augmenting the force, armament, or warlike equipment of any belligerent vessel of war within the territory of the United States, also the beginning or setting on foot, or providing or preparing means for any military expedition against the territory of either belligerent.

The movements of the belligerent cruisers on our coast and in our waters being such as to call for more explicit and stringent rules, President Grant on the 8th of October, 1870, issued a second proclamation, by which the belligerent ships were not permitted to frequent the waters of the United States for the purpose of preparing for hostile operations, or as ports of observation upon the ships of the other belligerent, and they were forbidden to leave the waters of the United States, from which a vessel of war, privateer, or merchant vessel of the other belligerent had sailed, until after the expiration of twenty-four hours from its departure. Belligerent vessels were not to use the ports of the United States except in case of necessity, and they were to leave port twenty-four hours after provisions had been secured or the necessary repairs effected. No supplies other than those necessary for the subsistence of the persons on board were to be taken, and only sufficient coal to take the vessel to the nearest European port of her own country, and until her return to such port no coal was to be supplied oftener than once in three months.

Belligerent ships of war, generally, entering ports of the United States were to remain but twenty-four hours, except in case of stress of weather, or for provisioning, or repairs.

In the case of the *Twee Gerbroeders*, one of several ships captured by an expedition from the British vessel *Espiegle*, then lying at anchor in neutral waters, Sir William Scott laid down a general principle as follows:

> An act of hostility is not to take its commencement on neutral ground. It is not sufficient to say it is not completed there; you are not to take any measure there that shall lead to immediate violence; you are not to avail yourself of a station on neutral territory, making as it were a vantage ground of the neutral country, a country which is to carry itself with perfect equality between both belligerents, giving neither the one nor the other any advantage.

Opinions vary as to the proper definition of a hostile expedition. Says Walker:

> Such an expedition in general consists of an armed and organized body of men about to depart the soil in pursuance of a present design to carry on hostilities in the immediate future against a particular government. But the absence of a single feature may change the character of the entire proceeding. In 1870 a body of 1,200 Frenchmen left New York to join the armies of their native land in her struggle against the Prussians, and the vessels which conveyed them also carried a large consignment of rifles and ammunition for the use of the French troops; but, these men being a mere disorganized force, their departure from American soil, it is universally acknowledged, in no way reflected upon the neutral intentions of the United States Government. On the other hand, the elements of an expedition may be recognized in a seemingly less dangerous proceeding.
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> The British ministers, for example, however open to criticism may have been their method of action, were well advised when in 1827 they conceived it to be their duty to prevent the landing in Terceira of Count Saldanha and his followers, although the members of the party left Plymouth entirely unarmed.

The question of hostile acts within neutral territory is largely one connected with the attacks upon or capture of belligerent ships in neutral waters. It is not only the right of the neutral to prevent this capture or attack, but also his duty; and if necessary the neutral should resort to force to defend the attacked belligerent and to punish the offender. It is a well-established rule of international law that if a ship should be captured under such circumstances it is the duty of the neutral State whose territory is violated to effect restitution if possible, and secure redress for the injured belligerent. Walker says:

As between a belligerent and his enemy a capture made within neutral waters is good prize; as between the captor and the neutral state, however, the capture imports an offense against the jurisdiction of the neutral Government, and as between the neutral Government and the captive, that Government it behooves, whether spontaneously or on the instigation of the injured shipowner, to address prompt complaints to the Government of the wrongdoer, or otherwise to grant redress for the wrong, an obligation which only, perhaps, ceases when the vessel attacked within the neutral zone attempts to shift for herself and to repress force by force. Should a captor or his agent be bold enough to bring his prize at a subsequent period into a port of the neutral Government, that Government may vindicate its offended jurisdiction by seizing property and liberating prisoners taken in violation of its protectorate.

In the case of the *Anna*, captured by a British privateer in 1805 near the mouth of the Mississippi River, the British Court of Admiralty not only restored the captured property, as having been taken within neutral territory, but fully asserted the sanctity of such territory from belligerent operations. In this case it was decided by Sir William Scott that territorial waters extend 3 miles, not only from the shore line, but from islands off the coast, no matter what their nature may be. This claim was made under the direction of the American minister as representing the neutral power wronged.

In the case of the privateer *General Armstrong*, destroyed by British vessels of war in the harbor of Fayal in 1814, a claim was made by the United States against the Portuguese Government for permitting a violation of the neutrality of the port by the British squadron. After a long controversy the matter was referred to the President of the French Republic in 1851, who decided that where a capture has been made in neutral waters a claim for damages by the injured belligerent against the neutral State is not allowed if the captured ship resisted instead of asking protection of the neutral. It is doubtful, notwithstanding this decision, whether it can be held to be established as a precedent that simple resistance to an attack on a ship and omission of formal application for protection from the neutral sovereign release that sovereign from his duty or the offending belligerent from the responsibility of the violation of neutral territory.[1]

Halleck says:

If a neutral State neglects to make restitution and to enforce the sanctity of its territory, but tamely submits to the outrages of one of the belligerents, it forfeits the immunities of its neutral character with respect to the other and may be treated by it as an enemy.

The French courts have also decided in the case of the *Perle* that a capture in neutral waters is illegal, whether made under the guns of a fort or simply on an undefended coast, and the vessel, at the instance

[1] Dana says, in note 218 to his edition of Wheaton, as to this case, that "the principle of the decision must certainly be confined to cases where the vessel attacked has reason to believe that effectual protection can be seasonably afforded by the neutral, and makes a fair choice to take the chances of a combat rather than appeal to neutral protection."

of the Spanish ambassador, who represented the neutral sovereign, was restored.

In the case of the British ship *Anne* it was decided by the Supreme Court of the United States in 1818 that if the captured ship first commenced hostilities in neutral waters she thereby forfeited neutral protection. In the same decision Judge Story delivered the opinion that a capture made in neutral waters is, as between enemies, deemed to all intents and purposes a legal capture. The neutral sovereign alone can call its validity in question. This latter principle has been repeatedly affirmed by courts in other cases, the infringement of the rights of the neutral sovereign being the ground of the invalidity of such captures.

In 1864 the Confederate cruiser *Florida* was seized in the harbor of Bahia, Brazil, by the U. S. S. *Wachusett*. The Brazilian Government at once demanded full reparation from the Government of the United States for this indignity and violation of its sovereignty. The United States expressed its regrets, dismissed the consul who had been concerned in the affair, tried the commanding officer of the *Wachusett* by court-martial, surrendered the crew of the *Florida*, and saluted the flag of Brazil in the bay of Bahia. The Government of the United States was unable to surrender the *Florida*, as she had been sunk in a collision in Hampton Roads. Says Halleck:

> If a belligerent cruiser, in acting offensively, passes over a portion of water within neutral jurisdiction, that fact is not usually considered such a violation of the territory as to invalidate an ulterior capture made beyond it. Permission to pass over territorial portions of the sea is not usually required or asked, because not supposed to result in any inconvenience to the neutral power.

Hall goes so far as to say that not only should property captured in violation of neutrality be seized upon entering the neutral's jurisdiction, but as a State has the right of pursuing vessels into the open sea and arresting them there for violations of the municipal law directed only against itself, the neutral State should have the right to vindicate its sovereignty and neutral duties in the same manner. This seems reasonable if the pursuit is made under the conditions of the pursuit and seizure for violations of municipal laws; that is, at the time or immediately after the act has occurred.[1]

When a ship captured in neutral waters becomes transformed into a man-of-war by the belligerent captor, most writers seem to agree that a reëntry into the neutral's port does not subject it to seizure, as it has become invested with the immunities of a vessel of war. There is no question, however, that such vessels can and should be denied the right to visit again the ports of a neutral whose territory has been violated. Brazil adopted a practice somewhat of this nature during our civil war.

In regard to affording refuge and hospitality in neutral ports to prizes captured outside of neutral territory, it may be considered that the best usage, unless it is otherwise provided by treaty stipulation, forbids belligerents to bring prizes into neutral ports except in case of stress of weather, danger, or want of supplies necessary to their navigability, and then the stay should be only so long as their necessities require. On no account should the sale of prizes be

[1] Wheaton doubts whether vessels condemned by prize courts after capture in neutral territory would be restored by a neutral if they came again within its jurisdiction; but Ortolan seems to have justice with him when he states that the sovereign rights of a nation can not be put aside by a foreign tribunal and hence such a decision is not binding so far as it is concerned.

permitted in neutral ports. During our civil war, by an order dated June 1, 1861, Great Britain forbade the armed ships of both belliger ents to carry their prizes into any British port.

The rule that when hostile ships meet in a neutral harbor the authorities of the port may prevent one ship from sailing until after an interval of twenty-four hours has elapsed from the sailing of the other is becoming a general one and will probably be enforced in all future maritime wars.

A further extension of this rule was made in 1861 by Great Britain on account of the incident of the U. S. S. *Tuscarora* and the Confederate cruiser *Nashville* at Southampton, England.

The *Tuscarora* had arrived in Southampton Water in the latter part of 1861, the *Nashville* being then in dock. By keeping up steam and having a slip rope on her cable, so that the moment the *Nashville* got under way the *Tuscarora* could slip and precede her and claim priority of sailing, and by returning again within twenty-four hours, and by notifying and then postponing her own departure, the *Tuscarora* was able virtually to blockade the *Nashville* within British waters for some time.

In order to guard against a repetition of such acts the British authorities directed that in the future during the war any vessel of either belligerent entering an English port should "be required to depart and put to sea within twenty-four hours after her entrance into such port, except in case of stress of weather, or of her requiring provisions or things necessary for the subsistence of her crew or repairs;" in such case the local authorities were to "require her to put to sea as soon as possible after the expiration of such period of twenty-four hours." This rule is virtually the same as that incorporated in the proclamation of President Grant in 1870.

SECTION 58.—EQUIPMENT OF VESSELS OF WAR IN NEUTRAL TERRITORY.

The neutrality and foreign enlistment acts of the various maritime States are those that cover such matters as the construction and equipment, in neutral territory, of vessels that may be used for belligerent purposes against any other State.

On account of our geographical position and our policy of abstaining from interference in European quarrels our Government has been under the necessity of enforcing these neutrality regulations to a greater extent than most other countries. Our stand of neutrality during the wars which involved all Europe during the latter half of the eighteenth and the beginning of the nineteenth century, and our proximity to the Latin-American States and colonies, with the constant wars and insurrections with which they are concerned, led to the enactment of the neutrality laws of 1794 and 1818, as well as to the existence of most of the cases which have arisen under them.

By the act of 1794, revised in 1818, and now standing in the statute books, it is declared to be a high misdemeanor, punishable by fine and imprisonment, for anyone to fit out and arm, or to increase and augment the force of any armed vessel, with the intent that such vessel be employed in the service of any foreign prince, State, colony, district, or people, at war with another State, colony, district or people, with whom the United States are at peace; or to begin, set on foot, or provide or prepare the means for any military expedition or enterprise against the territory of any foreign prince, etc., with whom we are at peace. Any

vessel or vessels fitted out for such purpose are made subject to forfeiture. The President of the United States is also authorized to employ force to compel any foreign vessel to depart which, by the law of nations, or by treaty, ought not to remain within the United States, and to employ the public force generally in compelling the observance of the duties of neutrality prescribed by law.

As a result of the controversy concerning the construction and fitting out of the *Alabama* and other Confederate cruisers, which afterwards resulted in the treaty of Washington and the Geneva Tribunal of Arbitration, Great Britain enacted the foreign enlistment act of 1870, section 8 of which provides:

> If any person within the dominions of Her Majesty builds or agrees to build, or issues or delivers any commission for any ship, or equips, dispatches, or causes or allows to be dispatched any ship with intent or knowledge, or having reasonable cause to believe that the same shall or will be employed in the military or naval service of any foreign State at war with any friendly State, such person shall be deemed to have committed an offense against this act.

The regulations that govern the French Republic are simpler and are in accord with the usage of the continental European nations. They are included in articles 84 and 85 of the French penal code, and provide briefly that whosoever shall expose the State to a declaration of war by hostile acts not approved by the Government will be punished by banishment. Reprisals attempted without the approval of the Government are subject to the same penalty.

Similar provisions are found in the penal codes of Italy, Portugal, Brazil, Spain, Russia, and the Netherlands.

One of the most important cases that have occurred under the neutrality acts of the United States is that of the *Santissima Trinidad*, in 1822, upon which a decision was rendered by the Supreme Court of the United States. The opinion was delivered by Mr. Justice Story of that court, and very much from this opinion was quoted in support of the case of Great Britain before the Geneva Tribunal.

The *Santissima Trinidad* was a Spanish ship captured on the high seas by two small armed vessels originally fitted out in the United States, but sold at Buenos Ayres to the government of that State. At a subsequent period one of these vessels had her crew substantially increased in the United States. The cargo of the *Santissima Trinidad* was libeled by the Spanish consul at Norfolk, who claimed restitution.

The judgment of the court was that citizens of a neutral State may send armed vessels to belligerent ports for sale, provided it be done as a *bona fide* commercial transaction, a ship in this situation being considered as merely an article of contraband of war.

The augmentation of the force of a belligerent cruiser in neutral territory was held to be illegal, and entailed the restoration of a prize made by such vessel if brought within the jurisdiction of the offended neutral.

The best comment upon this case and statement of its relation to the neutrality position of the United States up to the time of the treaty of Washington and its three rules and results at Geneva, may be found in the following extracts from the summary in Mr. Dana's note 215, in the eighth edition of Wheaton. They are as follows:

> As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied has not been the extent and character of the preparations, but the intent with which the particular acts are done. If any person does any act, or attempts to do any act, toward such preparation, with the intent that the vessel shall be employed in hostile operations, he is guilty, without

reference to the completion of the preparations, or the extent to which they may have gone, and although his attempt may have resulted in no definite progress toward the completion of his preparations. The procuring of materials to be used knowingly and with the intent, etc., is an offense. Accordingly it is not necessary to show that the vessel was armed, or was in any way or at any time, before or after the act charged, in a condition to commit acts of hostility. * * *

It will be seen at once, by these abstract definitions, that our rules do not interfere with *bona fide* commercial dealings in contraband of war An American merchant may build and fully arm a vessel, and supply her with stores, and offer her for sale in our own market. If he does any acts, as an agent or servant of a belligerent, or in pursuance of an arrangement or understanding with a belligerent, that she shall be employed in hostilities when sold, he is guilty. He may, without violating our law, send out such a vessel, so equipped, under the flag and papers of his own country, with no more force of crew than is suitable for navigation, with no right to resist search or seizure, and to take the chances of capture as contraband merchandise, of blockade, and of a market in a belligerent port. In such case, the extent and character of the equipments are as immaterial as in the other class of cases. The intent is all. The act is open to great suspicions and abuse, and the line may often be scarcely traceable; yet the principle is clear enough. Is the intent one to prepare an article of contraband merchandise, to be sent to the market of a belligerent, subject to the chances of capture and of the market? Or, on the other hand, is it to fit out a vessel which shall leave our port to cruise, immediately or ultimately, against the commerce of a friendly nation? The latter we are bound to prevent. The former the belligerent must prevent. In the former case, the ship is merchandise, under *bona fide* neutral flag and papers, with a port of destination, subject to search and capture as contraband merchandise by the other belligerent, to the risks of blockade, and with no right to resist search and seizure, and liable to be treated as a pirate by any nation, if she does any act of hostility to the property of a belligerent, as much as if she did it to that of a neutral. Such a trade in contraband, a belligerent may cut off by cruising the seas and blockading his enemy's ports. But to protect himself against vessels sailing out of a neutral port to commit hostilities, it would be necessary for him to hover off the ports of the neutral; and, to do that effectually, he must maintain a kind of blockade of the neutral coast, which, as neutrals will not permit, they ought not to give occasion for.

The cases of the *Alabama* and other cruisers, which gave rise to the treaty of Washington, may be found with sufficient fullness in Snow's Cases and Opinions, or exhaustively in the volumes which contain the papers relating to the treaty of Washington of 1871.

Article VI of that treaty provided for an arbitration to determine British liability for these depredations, the tribunal to be governed by the following three rules, and also by such principles of international law not inconsistent therewith as the arbitrators should determine to have been applicable to the case. The rules are:

A neutral government is bound—

First—To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or carry on war with a power with which it is at peace, such vessel having been specially adapted in whole or in part, within such jurisdiction, to warlike uses.

Secondly—Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

Thirdly—To exercise due vigilance in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Of these rules Calvo says, in the *Revue de Droit International*, that they are not new in principle, having been previously embodied in the practice and laws of most countries; that they were but the affirmation of preëxisting principles, sanctioned since long time by numerous facts and by the legislation and practice of nations.

Among other publicists, Bluntschli, Rolin-Jacquemyns, Esperson, Pradier-Fodéré, Geffcken, Fiore, Pierantoni, Kusserow, Caleb Cushing, and Bancroft Davis not only approve the three rules, but affirm that

the claims of the United States were justified by the general principles of international law independently of these rules.

The members of the *Institut de Droit International* in their session at Geneva in 1874 took into consideration these rules and pronounced an opinion that although the three rules, in point of form, were open to objection, in substance they were the clear application of a recognized principle of the law of nations.[1]

Prof. E. Robertson, in an article upon international law in the Encyclopedia Britannica, says:

> These rules, which we believe to be substantially just, have been unduly discredited in England, partly by the result of the arbitration, partly by the fact that they were, from the point of view of English opinions, *ex post facto* rules, and that the words defining liability (due vigilance) are vague and open to unforeseen constructions; for example, the construction actually adopted by the Geneva Tribunal, "that due vigilance should be exercised in proportion to the belligerent's risk of suffering from any failure of the neutral to fulfill his obligations."

The qualifying clause inserted at the request of the British Government in the treaty of Washington and the clause as to the future binding effect of the treaty, with respect to the rules, read as follows:

> Her Britannic Majesty has commanded her high commissioners and plenipotentiaries to declare that Her Majesty's Government can not assent to the foregoing rules as a statement of principles of international law which were in force when the claims mentioned in Article I arose; but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries and of making satisfactory provision for the future, agrees that in deciding the questions between the two countries arising out of those claims the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.
>
> And the high contracting parties agree to observe these rules as between themselves in the future, and bring them to the knowledge of other maritime powers, and to invite them to accede to them.

Without being recognized rules of international law it is not too much to say that the three rules of this treaty may be considered as embodying the general principles that will be applied in the subjects that are covered by them. Acceptance of the general principles of these rules does not, of course, imply acceptance of their exact language or of the interpretations given them by the arbitrators at Geneva. Conflicting opinions concerning these latter matters have been expressed both by writers upon international law and by English and American statesmen.

The controversy concerning the *Alabama* claims which led to the treaty of Washington had its effect upon the neutrality attitude of both Great Britain and the United States in 1870, as shown in the neutrality proclamations of President Grant and the enactment of the

[1] In 1875, by a majority vote of those in attendance, the *Institut* adopted the following as an expression of opinion upon the subject:

"L'État neutre désireux de demeurer en paix et amitié avec les belligérants et de jouir des droits de la neutralité, a le devoir de s'abstenir de prendre à la guerre une part quelconque, par la prestation de secours militaires à l'un des belligérants ou à tous les deux, et de veiller à ce que son territoire ne serve de centre d'organisation ou de point de départ à des expéditions hostiles contre l'un d'eux ou contre tous les deux.

"En conséquence, l'État neutre ne peut mettre, d'une manière quelconque, à la disposition d'aucun des États belligérants, ni leur vendre ses vaisseaux de guerre ou vaisseau de transport militaire, non plus que le matériel de ses arsenaux ou de ses magasins militaires, en vue de l'aider à poursuivre la guerre. En outre, l'État neutre est tenu de veiller à ce que d'autres personnes ne mettent des vaisseaux de guerre à la disposition d'aucun des États belligérants dans ses ports ou dans les parties de mer qui dépendent de sa juridiction."

British foreign-enlistment laws of that year. These laws are not only superior in efficiency to our existing statutes, revised in 1818, but are probably the best expression of the principles and of the "due diligence" required by the treaty of Washington borne upon the statute books of any nation.

The Geneva Tribunal, it may be well to state here, found under the rules and the interpretation of the rules adopted by them that the British Government was lacking in due vigilance in the cases of the *Alabama*, *Florida*, and *Shenandoah;* and by a majority of 4 votes to 1 awarded to the United States the sum of $15,500,000 by way of damages.

As to the *Alabama*, Bluntschli says in *Revue de Droit International*, II, 468, that the *Alabama* was an English vessel by her origin, her construction, her armament, and her crew, and American only in so far as she was commanded by persons bearing the commission of the Confederate States. He considered her equipment an act of hostility on the part of England. Rolin-Jacquemyns, basing his opinion upon the statement of facts concerning the *Alabama* given by Mr. Montague Bernard in his work, calls it a case of "sympathetic negligence."

Walker, an English writer on international law, says:

> There was overmuch consulting of lawyers and overlittle exercise of the striking arm. They adopted moreover an emasculated interpretation of the foreign-enlistment act and thereby threw open a wide door to fraud. Lastly, they carried courtesy toward a foreign Government to the verge of self-abasement when they not only recognized the commissions of well-known violators of their neutrality, but freely admitted them to the hospitalities of British ports.

In the formal announcement of the decision of the arbitrators at Geneva certain definitions and conclusions under the three rules were given which have led to much discussion and difference of opinion among publicists and others.

For this reason, among others, the two Governments have failed to agree in bringing the three rules formally to the attention of other powers with a view of obtaining their assent to them. Earl Granville, in a dispatch to Secretary Fish in regard to the matter of submitting the rules to the other powers, says that the presentation of the three rules to the great powers by Great Britain would probably be considered as an acceptance of the interpretation given them at Geneva and would cause the rejection of the three rules by all of these powers.

The changes made by the introduction of steam with a constantly quickening speed of ships, and the increase in size, cost, and time required for the construction of modern vessels of war, especially armored vessels, have caused a revolution in naval construction and equipment, as well as in the conditions of naval warfare.

The effect of these new conditions must not be ignored in the questions under discussion. By these changes in conditions the value of a single vessel, if armored and armed in accordance with the latest improvements, is so great as to place it on a plane entirely different from that occupied by sailing and other vessels, whose equipment and construction by neutrals form the subject of most of the cases quoted in treatises upon international law.

The possession of modern seagoing armored vessels by either belligerent may easily have a decisive effect upon the issue of the struggle. The gravity of permitting the issue of a vessel of this kind from a neutral port was not exaggerated by Mr. Adams, our repre-

sentative in London, in the case of the two armored rams built for the Confederate Government, though nominally for a French house, by the Messrs. Laird, at Liverpool.

On the 5th of September, 1863, Mr. Adams wrote to Earl Russell that one of these vessels was "on the point of departure from this kingdom on its hostile errand against the United States." He added, after a description of the warlike character and great power of these vessels, that "It would be superfluous in me to point out to your lordship that this is war."

"He declined," says Mr. Dana, "to repeat his arguments, and with this letter closed the subject. It was left to be understood that the sailing of the rams would be—not a probable cause of war, but war itself. In the course of the day he received a letter from Earl Russell announcing that the Government had issued orders to prevent their departure."

It is well to observe that the great cost and elaborate construction of a modern fighting vessel render its building less and less probable as a matter of business speculation, and render also the intent of construction and of purchase more evident. Still, in view of the very serious consequences that may result from such acts upon the part of neutrals in these days, it seems beyond argument that quickened vigilance and an increased diligence on the part of the neutral State is more required in regard to the construction, equipment, and departure of vessels designed exclusively for purposes of war.

Considering, then, this state of affairs it may not be improbable that the prescription of the arbitrators at Geneva as to due diligence may come to be accepted in the future as an approximation to the definition of the duty of a neutral. It reads as follows:

> And whereas the "due diligence" referred to in the first and third of said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed from a failure to fulfill the obligations of neutrality on their part, etc.

As to fast steamers that are capable of being converted from merchant steamers into transports, depot vessels, supply steamers, commerce protectors, and commerce destroyers; for many reasons they stand upon a different basis from vessels designed and built for fighting purposes alone. Hall says of these:

> Mail steamers of large size are fitted by their strength and build to receive, without much special adaption, one or two guns of sufficient caliber to render the ships carrying them dangerous cruisers against merchantmen. These vessels, though of distinct character in their marked forms, melt insensibly into other types, and it would be impossible to lay down a rule under which they could be prevented from being sold to a belligerent and transformed into constituent parts of an expedition immediately outside neutral waters without paralyzing the whole shipbuilding and ship-selling trade of the neutral country.

SECTION 59.—LOANS OF MONEY AND SALES OF MUNITIONS OF WAR TO BELLIGERENTS BY NEUTRALS.

In discussing the questions of neutral rights and obligations, the distinction should be sharply drawn between neutral States and their subjects and citizens.

The neutral State is, as we have seen, under obligation toward the belligerents not to aid nor allow aid to either belligerent as against the other in or from its own territory.

But as between the belligerents and the neutral individual, no legal obligation can be said to exist. Each individual owes duty only to his

own sovereign and acts done by individuals to injure a belligerent are criminally wrong only so far as they compromise the State of the individual.

In return the belligerent State is under obligation only to other States, and its conduct toward the neutral individual is limited only by international agreements and by the accepted rules and usages of international law; within these rules the belligerent is at liberty to act toward the neutral individual as he may deem necessary for the prosecution of the war. Such action is, however, generally performed by means of a judicial system of its own, the penalties being prescribed as well as enforced by itself.

Loans of money to one of the belligerent States, made or guaranteed by a neutral State, are manifestly improper. They are direct aid, given by one of the most effective agencies of modern times.

But loans of money by neutral individuals are another matter; they are matters of business, of *quid pro quo*, and not a violation of State obligations toward a belligerent. Hall says of this question:

> A modern belligerent no more dreams of complaining because the markets of a neutral nation are open to his enemy for the purchase of money, than because they are open for the purchase of cotton. The reason is obvious. Money is, in theory and in fact, an article of commerce in the fullest sense of the word. To throw upon neutral governments the obligation of controlling dealings in it, taking place within their territories, would be to set up a solitary exception to the fundamental rule that States are not responsible for the commercial acts of their subjects. * * * Money is merchandise, the transmission of which would elude all supervision. Loans need not be handed over in specie; it is possible that payment might be made in bills, not one of which might enter the neutral country in which the contract is made, and if it were attempted to stop the practice by penalties, nothing could be more easy than for the real lenders to conceal themselves behind names borrowed in the country of the belligerent debtor.

During the Franco-Prussian war, both the French loans and part of the North German Confederation loan were issued in England. Mr. Webster, when Secretary of State, as far back as 1842, said:

> As to advances and loans made by individuals to the government of Texas or its citizens, the Mexican Government hardly needs to be informed that there is nothing unlawful in this as long as Texas is at peace with the United States and that these are things which no government undertakes to be responsible to restrain.

Woolsey says, also:

> The private person, if the laws of his own State or some special treaty does not forbid, can lend money to the enemy of a State at peace with his own country or can enter into its service as a soldier, without involving the government of his country in guilt.

As to the munitions of war, an application of the same rule seems logical. A sale of arms, directly or indirectly, by a State, to one or even both of the belligerents, seems to be a violation of neutral obligations. Says Hall:

> The general principle that a mercantile act is not a violation of a State's neutrality, is pressed too far when it is made to cover the sale of munitions or vessels of war by a State. Trade is not one of the common functions of a government, and the extraordinary motive must be supposed to stimulate an extraordinary act. The nation is exceptionally unfortunate which is forced to get rid of surplus stores precisely at a moment when their purchase is useful to a belligerent.

The case of the Swedish frigates, which is much quoted in this connection, is as follows: About 1825 the Swedish Government wishing to reconstruct its navy, offered some of its older vessels for sale, first to Spain, then at war with its American colonies, and then to an open market. Three of the vessels were finally sold to a Stockholm mercantile house, which immediately sold them to an English house. As this

latter house was known to be agent of the Mexican Government, with whom Spain was engaged in hostilities, the Spanish *chargé d'affaires* protested against the transfer as an act of hostility. The Swedish Government replied that in the sale they had merely exercised an ordinary legal right, but afterwards when opportunity arose the contract was dissolved at some pecuniary loss to the Swedish Government and the vessels were taken back.

In 1868 the Congress of the United States authorized the sale of the immense stock of munitions of war left on hand at the end of the civil war. During the Franco-Prussian war a large quantity of these munitions were sold under this act at open sale to Americans who afterwards proved to be agents for the French Government. The matter became a subject of investigation in the United States Senate, and the committee charged with the subject reported that the sale was made with no intention that these articles should go into the hands of either belligerent. The committee further reported that the sale was lawful and proper, and would have been so if the sale had been made directly to one of the belligerents.[1]

It is to be hoped that neither the report of the Senate committee nor the circumstances reported upon will be considered as a settled precedent on the part of the United States. The report confounds the rights and duties of a neutral State with those of its citizens. Such a sale of arms, however innocent the intentions may be, can hardly fail to raise the suspicion of bad faith on the part of the neutral government. The fact that a war between foreign States provides the best opportunity for the sale of munitions of war by a neutral State is also an indication of the probable destination of such munitions of war. As to individuals, the following quotation from Jefferson gives both our present and past practice:

> Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them. To suppress their callings, the only means perhaps of their existence, because a war exists in foreign and distant countries in which we have no concern, would scarcely be expected. It would be hard in principle and impossible in practice. The law of nations, therefore, respecting the rights of those at peace, does not require from them such an internal derangement in their occupation. It is satisfied with the external penalty pronounced in the President's proclamation, that of confiscation of such portion of these arms as shall fall into the hands of the belligerent powers on their way to the ports of their enemies.

[1] Snow's Cases, p. 459.

CHAPTER X.

AID TO INSURGENTS; CONTRABAND OF WAR.

SECTION 60.—AID TO INSURGENTS.

It has already been stated that though belligerent communities possess all the rights of war, there is no obligation on the part of existing States to recognize this right in insurgents.

Dana, in a note to Wheaton, speaking of the recognition of belligerency in a civil conflict, which must be accorded if a state of war exists, says, among other things:

> If it is a war, the rules and risks respecting carrying contraband, or dispatches, or military persons, come into play. If it is not a war, they do not. Within foreign jurisdiction, if it is a war, acts of the insurgents, in the way of preparation and equipments for hostility, may be breaches of neutrality laws; while if it is not a war, they do not come into that category, but into the category of piracy or of crimes by municipal law.

The municipal laws of the United States, commonly known as the neutrality acts of 1794 and 1818, do not, however, draw any distinction in language between belligerents and insurgents. The criminal feature is the fitting out of a vessel with intent that such ship or vessel shall be employed in the service of any foreign prince, or State, or of any colony, district, or people, to cruise or commit hostilities upon the subjects, citizens, or property of another foreign prince, State, etc.

Of the application of this act Attorney-General Hoar says, in an opinion delivered in 1869,[1] as follows:

> The neutrality act of 1818 is not restricted in its operation to cases of war between two nations, or where both parties to a contest have been recognized as belligerents, that is, as having a sufficiently organized political existence to enable them to carry on war. It would extend to the fitting out and arming of vessels for a revolted colony whose belligerency had not been recognized, but it should not be applied to the fitting out, etc., of vessels for the parent State for use against a revolted colony whose independence has not in any manner been recognized by our Government.

Under this act of 1818, as thus construed, the policy of the executive has been a settled one with respect to insurgents. The greater part of the cases that have arisen have been in connection with the insurrections and disturbances in the Island of Cuba and in the Republics of Central and South America.

The formation of filibustering expeditions within the United States for insurrectionary purposes against other governments has been of sufficient frequency to call for many applications of our neutrality act.

The duty of the United States toward other countries with which they are at peace is a matter of international law, but the penal methods used to prevent individuals from using our territory in ways that are inconsistent with that duty belong to the domain of municipal law. It follows that neutrality acts may prohibit and punish many things which international law does not require neutral nations to prevent.

[1] 13 Opp., 177, Hoar, 169.

In discussing this phase of the subject, Secretary Bayard wrote, in 1886, to Mr. Hall, our minister to Central America, as follows:

Breaches of neutrality may be viewed by this Government in two aspects: first, in relation to our particular statutes, and, secondly, in respect to the general principles of international law. Our own statutes bind only our own Government and citizens. If they impose on us a larger duty than is imposed on us by international law, they do not correspondingly enlarge our duties to foreign nations, nor do they abridge our duties if they establish for our municipal regulation a standard less stringent than that established by international law.

Mr. Bayard, in a previous year, in a letter to Mr. Valera, the Spanish minister, had expressed himself more pertinently in the following words:

I need scarcely remind you that the phrase "neutrality act" is a distinctive name, applied for convenience sake merely, as is the term "foreign-enlistment act" to the analogous British statute. The scope and purpose of the act are not thereby declared or restricted. The act itself is so comprehensive that the same provisions which prevent our soil from being made a base of operations by one foreign belligerent against another likewise prevent the perpetration within our territory of hostile acts against a friendly people by those who may not be legitimate belligerents, but outlaws in the light of the jurisprudence of nations. There is and can be no "neutrality" in the latter case. If the hostile party carries his hostility beyond the pale of the law, he commits a crime against the United States, and is amenable to the prescribed process and punishment.

In the judgment given in the case of the *Itata*, some expressions on the part of Judge Ross, who presided over the case, seem to imply another view as to the bearing of the act of 1818 on insurgents; but as the judgment in the case did not depend upon these views, they have not been subject to review by our highest court. It is doubtful if they would be sustained by that court. They are certainly at variance with the practice and policy of the executive department since and even before the enactment of the law of 1818.

The *Itata* case presents many interesting points, however, coming within this subject. It is given in full in Snow's Cases,[1] but will be treated somewhat briefly here.

The *Itata*, a merchant steamer, was captured in May, 1891, in Valparaiso harbor by the Congressional party, then in insurrection against the established or Balmaceda Government of Chile. After capture she was given a light armament and used for transport and other purposes under the command of a naval officer.

Trumbull and Burt, the defendants in the case, came to the United States as agents for the Congressionalists and purchased arms and ammunition in New York, which were sent by rail to San Francisco.

The *Itata* was sent by the Congressionalists to the United States to receive the purchased arms and transport them to Chile. Convoyed by the war vessel *Esmeralda* as far as Cape San Lucas, the *Itata* proceeded from there under the command of the captain of the *Esmeralda* to San Diego. When she reached that port she was disguised as a peaceful merchantman, with another person ostensibly in command. While at San Diego she took in stores of coal and provisions, some of which were marked *Esmeralda*.

Meanwhile the arms sent to San Francisco were shipped in a chartered schooner, the *Robert and Minnie*, which proceeded to Santa Barbara Islands off southern California to meet the *Itata* for the purpose of transferring to her the arms. Suspicion being aroused, the marshal of the district took possession of the *Itata* for a violation of the neutrality laws, a keeper was put on board, and a search made for the

[1] U. S. *v.* Trumbull, p. 443.

Robert and Minnie. Arrangements having been made, however, between the schooner and the *Itata*, on the 6th of May, 1891, the *Itata* without clearance and against the protest of the ship-keeper in charge, went to sea, putting the keeper on shore at the mouth of the harbor. On the 9th of May the *Itata* and the schooner came together about a mile and a half from San Clemente Island, one of the Santa Barbara group, and the arms being transferred to the *Itata*, this vessel left at once for Chile.

The Government of the United States had not at that date recognized the Congressional party as belligerents or otherwise.[1] The Navy Department of the United States had, however, instructed the admiral commanding the naval force in the Pacific not to render any assistance to either party, and instructing him that the ships of the Congressional party were not to be treated as piratical so long as they waged war only against the established or Balmaceda Government.

The indictment was made under Sections 5283, 5285, and 5286 of the Revised Statutes. As to section 5285, which prescribes penalties for anyone increasing the force of any foreign ship of war for use against any foreign State, etc., with which the United States are at peace, by adding to the number of her guns, etc., it was conceded that the evidence against the accused was insufficient.

As to section 5286, which prescribed punishment for any person who within the territory of the United States "begins or sets on foot or provides or prepares the means for any military expedition to be carried on from thence" against a foreign State, it was held that the expedition was begun in Chile and that sending a ship from Chile to the United States to transport arms back to Chile did not bring the ship under this section.

The counts under section 5283 which deals with the fitting out and arming of a vessel with the intent that such vessel be employed in the service of any foreign prince, State, colony, district, or people, to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or State, etc., with whom the United States are at peace, etc., charged the defendants with unlawfully fitting out the *Itata* to cruise and commit hostilities against the established Government of Chile.

It was concerning this section that Judge Ross expressed his doubts as to its applicability to the case, upon the grounds that the Congressional party did not constitute "a people" within the meaning of the section. Taking the safe ground that the status of the insurgents was to be ascertained by the position of the political or executive department of the United States, he claimed, from the dispatches (especially that from the Navy Department previously quoted) that the Congressional party were a people "whom it is optional with the United States to treat as pirates," sustaining his position from Secretary Fish's letter concerning the Haitian insurgents in 1869 already quoted in this volume.

But the dispatches from the Navy Department applying to the Chilean insurrection first to Admiral McCann enjoined strict neutrality between the parties and afterwards to Admiral Brown instructed him "not to treat the ships of the Congressional party as piratical, so long as they waged war only against the Balmaceda Government." The judge seems to have held also that a recognition of belligerency or independence was necessary to cause the word "people" in the act to

[1] The recognition by the United States of the victorious Congressional party as the established Government of Chile occurred about four months after these events.

apply. A careful reading of the decision in the case of The United States *v.* Quincy, upon which the judge seems mainly to rely, will not, it is thought, support this opinion. In that case the Supreme Court was asked to rule that the word "people" in section 5283 was intended to apply solely to unrecognized communities. This ruling the court declined to make. But there is strictly nothing in the judgment on this point to warrant the inference that the word "people" does not also apply to unrecognized communities. The decision was, in effect, that recognition of a community by the United States does not make the word "people" inapplicable to it. It would seem to follow that the views expressed in the *Itata* case, tending to limit the scope of the neutrality law of 1818 to acts done in behalf of recognized belligerents, can not be sustained by anything in the judgment in United States *v.* Quincy. Further, that view is distinctly at variance with the practice of the State Department and the opinion of Attorney-General Hoar already quoted. One of the main purposes of the neutrality law is to prevent, within our jurisdiction, acts which may tend to involve the United States in war with other countries. This purpose would be defeated if acts done on behalf of unrecognized insurgents were held to be exempt from the penalties of the law. In all ways, therefore, it seems clear that the doubts of the learned judge were not well founded and that the status of the Congressional party in Chile was such as to bring acts done in their behalf within the prohibitions of section 5283.

The judge did not, however, rest his instruction to the jury to find a verdict of not guilty upon his doubts as to the applicability of this section to the case. None of the acts shown by the evidence constituted an arming, fitting out, or furnishing the *Itata* with the intent that she should cruise or commit hostilities against the established Government of Chile. On the contrary, her only purpose was that of a storeship to transport the arms in question to Chile to be used on shore there by the insurgents. This was held by the judge not to come in conflict with this or any other section of the laws referred to. In support of this view he quoted from an opinion of Attorney-General Speed,[1] in which it is said:

> I know of no law or regulation which forbids any person or Government, whether the political designation be real or assumed, from purchasing arms from the citizens of the United States and shipping them at the risk of the purchaser.

In 1870, in the case of the *Salvador*, it was held by the privy council of Great Britain that a British vessel fitted out in aid of insurgents in the Island of Cuba was liable to forfeiture under the seventh section of the foreign enlistment act of 1819.

It may be well to add, however, that the penalties of the British statute are expressly extended to acts done in behalf of "any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the power of government in or over any foreign country, colony, province, or part of any province or people." This enumeration is undoubtedly more complete than that given in our neutrality acts.

SECTION 61.—CONTRABAND OF WAR.

(*a*) *General law of contraband.*—The general law of contraband may be given under two heads, as follows:

(1) A State may not lawfully furnish contraband articles to either belligerent, whether shipment be by land or by water.

[1] 11 Opp. Atty. Gen., 452.

(2) The citizens of a neutral State may sell contraband articles to a belligerent (ships of war or torpedo boats excepted) subject only to the risk of capture by the cruisers of the opposing belligerent. That is to say, such trade is legal from the neutral point of view and illegal from the belligerent point of view.

The neutral State is not bound to prevent the trade; but a belligerent may prevent it by seizing the goods in transit on the ocean, by the law of right of self-defense and self-preservation.

Chief Justice Chase of the United States Supreme Court, in his opinion upon the *Peterhoff* case in 1866, says:

> The trade of neutrals with belligerents in articles not contraband is absolutely free, unless interrupted by blockade; the conveyance by neutrals to belligerents of contraband articles is always unlawful, and such articles may always be seized during transit by sea.

This language is somewhat loose and gives the views from a belligerent standpoint alone.

The question of unlawfulness, from a neutral standpoint, is better given by Mr. Justice Kent in the case of Seton *v.* Low, in the Supreme Court of New York, in 1799. He speaks of the legality of the trade as follows:

> I am of the opinion that the contraband goods were lawful goods, and that whatever is not prohibited to be exported by the positive law of the country is lawful. It may be said that the law of nations is part of the municipal law of the land, and that by that law (and which so far as it concerns the present question is expressly incorporated into our treaty of commerce with Great Britain) contraband trade is prohibited to neutrals and consequently unlawful. This reasoning is not destitute of force, but the fact is that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers, and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade[1]; and yet at the same time, from the law of necessity, as Vattel observes, the powers at war have the right to seize and confiscate the contraband goods, and this they may do from the principle of self-defense. The right of the hostile powers to seize, this same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. They are rights which may, at times, reciprocally clash and injure each other. But this collision is the result of inevitable necessity, and the neutral has no just cause to complain. A trade by a neutral in articles contraband of war is, therefore, a lawful trade, though a trade from necessity subject to inconvenience and loss.

Probably the latest official formal declaration upon the subject with us is contained in President Grant's neutrality proclamation of August 2, 1870, in which it is said:

> While all persons may lawfully and without restriction, by reason of the aforesaid state of war, manufacture and sell within the United States arms and munitions of war and other articles ordinarily known as "contraband of war," yet they can not carry such articles on the high seas for the use or service of either belligerent, nor can they transport soldiers or officers of either or attempt to break any blockade which may be lawfully established and maintained during the war without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf.

Contraband articles carried overland can not of course be stopped. Since railway systems have been introduced and extended, a State, situated as nearly all of the nations of continental Europe are placed, can get supplies by land in time of war so long at least as it remains at peace with any of its neighboring States.

[1] This is somewhat too broad for the present day as to trade in vessels of war by neutrals.

In 1870 Bismarck remonstrated against the shipment of coal from England to France. The English Government replied that during the Crimean war Prussia permitted her subjects to furnish Russia with all kinds of contraband articles across the border, and also permitted others to send such articles across Prussian territory to Russia.

It has been suggested that neutral States should be obliged to restrain the trade in contraband of war, and in the case of ships of war we have seen that this is growing to be the rule now. When it comes to the shipment of heavy guns, rifles, and ammunition in enormous quantities, it has been argued that there is hardly much difference in principle between such sales and those of ships; that the one may affect the course of the war as much as the other. Bluntschli, representing the German school, thinks that though trade in contraband on a small scale may be permitted, yet on a great scale it ought to be prohibited by the neutral States. Perhaps international law may develop in the direction of limiting such trade, but this seems doubtful at present.

The great difficulty of making a distinction between contraband trade upon a large and small scale would alone present a serious obstacle to such a rule. Austria in 1854 prohibited the export of contraband, but in 1870 and 1877 this prohibition was not attempted.

On the whole, we may conclude that the assumption by the neutral States of the task of preventing contraband trade is one not likely to be undertaken for the benefit of belligerents as an addition to the other and increasing duties required from the neutral State during modern warfare.

The question of contraband of war is almost exclusively one of transport upon the high seas, and hence an important question for officers of any navy that may become belligerent. Says Halleck:

> The liability to capture can only be determined by the rules of international law as interpreted and applied by the tribunals of the belligerent State to the operation of whose cruisers the neutral merchant is exposed.

In making captures of this kind it must be borne in mind that the question of evidence is involved as well as that of international law.

Moseley, in discussing this subject in a general manner, says:

> The tendency of all the recent authorities, both in works written on the subject and in judicial decisions, especially the decision of Sir William Scott, goes to show that contraband or not contraband of war is a question of evidence, to be determined in each case by reference not to one particular rule of law, but many; not to any one fact, however strong that may be, but to all the circumstances connected with the goods in question. It is not only, or not so much, whether the goods are as in themselves, or as belonging to a class, capable of being applied to a military or naval use, but whether, from all the circumstances connected with them, those very goods are or are not destined for such use.

(*b*) *Classification of contraband.*—Woolsey says:

> When, however, we ask what articles are contraband, the answer is variously given. Great maritime powers, when engaged in war, have enlarged the list; the nations generally neutral have contracted it. Treaties defining what is contraband have differed greatly in their specifications; the same nation in its conventions with different powers at the same era has sometimes placed an article in the category of contraband, and sometimes taken it out. Writers on the law of nations, again, are far from uniformity in their opinions. To make the subject clear, it is necessary to enter into a consideration of different classes of articles.

In the *Peterhoff* case, Chief Justice Chase, of the Supreme Court of the United States, in delivering the opinion of the court, made the following general classes:

> The first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war;

The second, of articles which may be and are used for purposes of war and peace, according to circumstances; and

The third, of articles exclusively used for peaceful purposes.

Merchandise of the first class, destined for a belligerent country or places occupied by the army or navy, is always contraband; merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent; while merchandise of the third class is not contraband at all, although liable to seizure and condemnation for violation of blockade or siege.

In the British Admiralty Manual of Prize Law (1888) it is stated that it is part of the prerogative of the Crown during war to extend or reduce the lists of articles to be held absolutely or conditionally contraband. For the present the following goods are enumerated:

(1) As absolutely contraband: Arms of all kinds and machinery for manufacturing arms; ammunition and materials for ammunition, including lead, sulphate of potash, muriate of potash, chlorate of potash, and nitrate of soda; gunpowder and its matarials—saltpeter and brimstone; also gun cotton; military equipments and clothing, military stores, naval stores, such as masts, spars, rudders, and ship timber; hemp and cordage, sail cloth, pitch and tar, copper fit for sheathing vessels, marine engines and the component parts thereof, including screw propellers, paddle wheels, cylinders, cranks, shafts, boilers, tubes for boilers, boiler plates, and fire bars; marine cement and the materials used in the manufacture thereof, as blue lias and Portland cements; iron in any of the following forms: anchors, rivet iron, angle iron, round bars from three-fourths to five-eighths inch diameter, rivets, strips of iron, sheets, plate iron exceeding one-fourth inch and Lowmoor and Bowling plates.

(2) As conditionally contraband: Provisions and liquors fit for the consumption of army and navy; money, telegraphic materials, such as wire, porous cups, platinum, sulphuric acid, and zinc; materials for the construction of a railway, as iron, brass, sleepers, etc.; coal, hay, horses, rosin, tallow, timber.

Of the articles known as conditionally contraband coal has become the most important.

When this question first came up in 1859, General Cass, then Secretary of State, said, in view of the importance of coal in commercial navigation:

The attempt to enable belligerent nations to prevent all trade in this most valuable accessory to mechanical power has no just claim for support in the law of nations; and the United States avow their determination to oppose it as far as their vessels are concerned.

The restriction as to furnishing of coal to belligerent vessels in neutral ports is not on account of its contraband nature, but because such a supply would increase the war force and operations of a ship. There is little doubt, however, with its greatly increased value as an agent in modern naval warfare, that coal will be ruled as conditionally contraband with us as it is with Great Britain. Kent, in treating of articles that may be under certain conditions contraband, such as coal and provisions, says:

The most important distinction is whether the articles were intended for the ordinary use of life, or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. The nature and quality of the port to which the articles are going is not an irrational test. If the port be a general commercial one, it is presumed the articles are going for civil use, though occasionally a ship of war may be constructed in that port, or there may be an unusually large demand for warlike stores thereat in consequence of contiguity to one or other of the belligerent countries. But if the great predominant character of that port, like Brest in France, or Portsmouth in England, be that of a port of military or naval equipment, it will be presumed that the articles are going for military use, although it is possible that the article might have been applied to civil consumption.

As it is impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is

very much inflamed if at the time when the articles were going a considerable armament was notoriously preparing to which a supply of those articles would be eminently useful.

England, during the Franco-Prussian war, judged of coal in this way. She refused to consider it as unconditionally contraband, but vessels were prohibited from sailing directly from English ports with coal for the French fleet in the North Sea. It is probable that nations having a limited coal supply will strive to keep coal from the list of contraband articles. France and Russia are at the present time the leading opponents among nations to declaring coal as contraband of war.

Provisions, as it has been said, stand in the same position as coal. In the case of the *Jonghe Margaretha* it was held by Sir William Scott that provisions, in this case Dutch cheeses, going to a port of naval equipment of the enemy like Brest were to be treated as contraband of war.

In the case of the *Commercen* the Supreme Court of the United States held:

By the modern law of nations provisions are not in general deemed contraband, but they may become so, although the property of a neutral, on account of the particular situation of the war or on account of the destination. If destined for the ordinary use of life in the enemy's country they are not in general contraband, but it is otherwise if destined for military use. Hence if destined for the army or navy of the enemy, or for his ports of naval or military equipment, they are deemed contraband.

France, in 1885, during her hostilities with China, declared shipments of rice destined for any port north of Canton to be contraband of war. England protested upon the ground that though in particular cases provisions may be treated as contraband, they can not be so declared in all cases. France justified her action by the fact that rice was essential to feeding the Chinese population as well as the Chinese armies. In the end the English Government notified the French Government that it would not consider itself bound by the decision of any prize court that would put into effect the doctrine advanced by France. No case, however, occurred during the hostilities, as the trade was stopped by the French declaration.

Mr. Kasson, then our minister at Vienna, wrote to the Secretary of State, calling attention to the importance to American commerce of the principle involved in the declaration of France, the United States being likely to be neutral in European wars and being at the same time a great food-exporting country. He went on to say:

The real principle involved goes to this extent, that everything the want of which will increase the distress of the civil population of the belligerent country may be declared contraband of war. The entire trade of neutrals with belligerents may thus be destroyed without the establishment of an effective blockade of ports. War itself would become more fatal to neutral States than to belligerent interests.

Here, again, appears the question as to the method of warfare for the future—whether it is to be a war of people against people or between armed forces alone.

As to horses, it has been the custom of England and France to regard horses as contraband. By the twenty-fourth article of the treaty between France and the United States in 1778, horses, with their furniture, were held to be contraband. In the treaties between the United States and the South American Republics cavalry horses are considered as contraband. Halleck says:

As between countries on the same continent, horses are usually regarded as contraband, since, when they can be readily transported, they form an important and peculiarly available contribution to military strength.

With improved sea transport the trade in horses and mules has been much extended, and in South African as well as European wars horses and mules have been drawn from the United States.

Hall says that to place an army on a war footing often exhausts the whole horse reserve of the country; the subsequent losses must be supplied from abroad, and more necessarily so as the magnitude of the armies increases. Almost every imported horse is probably bought on account of the governments; if in rare instances it is not, some other horse is at least set free for belligerent use.

Money, silver plate, and bullion, when destined for hostile use or for the purchase of hostile supplies, are contraband of war.

Cotton was contraband of war during the late civil war, when it was the basis upon which the belligerent operations of the Confederacy rested. * * * Cotton, in fact, was to the Confederacy as much munitions of war as powder and ball, for it furnished the chief means of obtaining these indispensables of warfare.[1]

The question of contraband articles is largely a matter of treaty. The following list of articles held to be contraband is taken from the treaty concluded with Bolivia in 1858:

This liberty of navigation and commerce shall extend to all kinds of merchandise excepting those only which are distinguished by the name of contraband of war. Under this name shall be comprehended:

1st. Cannon, mortars, howitzers, swivels, blunderbusses, muskets, fusees, rifles, carbines, pistols, pikes, swords, sabres, lances, spears, halberds, hand grenades, bombs, powder, matches, balls, and other things belonging to the use of these arms.

2nd. Bucklers, helmets, breast plates, coats of mail, infantry belts, and clothes made up in the form and for military use.

3rd. Cavalry belts, and horses, with their furniture.

4th. And, generally, all kinds of arms, offensive and defensive, and instruments of iron, steel, brass, and copper, or any other materials manufactured, prepared, and formed expressly to make war by sea or land.

All other merchandises and things not comprehended in the articles of contraband explicitly enumerated and classified as above shall be held and considered as free, and subjects of free and lawful commerce, so that they may be carried and transported in the freest manner by the citizens of both contracting parties, even to places belonging to an enemy, excepting only those places which are at that time besieged or blockaded.

The following treaties give exactly the same list of contraband and hold the same language as to freedom of trade: Dominican Republic, 1867; Ecuador, 1839; Guatemala, 1849; Haiti, 1864; Mexico, 1848.

The treaties with the United States of Colombia, 1846, Salvador, 1850, give the same list of articles directly contraband, but add "provisions that are imported into a besieged or blockaded place." These are the only treaties, it may be noted, concluded by the United States subsequent to the treaty of 1794 with Great Britain, in which it is admitted that provisions become contraband under any circumstances. The reason for including them in the list of contraband in the cases named is not clear, since they would be condemned on another ground, namely, breach of blockade.

The following treaties contain substantially the same list of contraband as that given above:

Italy, 1871—the treaty "expressly declares that the following articles, and no other, shall be considered under this denomination." Horses are omitted from the list, but "war saddles and holsters" are included.

Holland, 1872—"soldiers, saltpeter, sulphur, and saddles" are included. Naval stores of all kinds are expressly excepted from the list of contraband, "even if suited for the construction and equipment of vessels of war and for the manufacture of implements of war."

[1] Secretary Bayard to Señor Muruaga, June 28, 1886.

Sweden, 1783, renewed by treaty with Sweden and Norway, 1827—includes "sulphur and saltpeter" and expressly excludes naval stores.

Spain, 1795—includes saltpeter and excludes naval stores. Vessels of war of either party may, in case of necessity, take any portion of the cargo of merchant vessels belonging to the other, paying for the articles taken the same price as would have been realized at the port of destination.

Prussia, 1799, renewed by the treaty of 1828—includes "saltpeter and sulphur" and omits horses.

France, 1800—includes saltpeter in the list, but omits horses. Venezuela, 1860—adds saltpeter to the list.

Treaties with Brazil, 1828, and Chile, 1832, contained the same list of contraband as that given in the treaty with Bolivia, but were all terminated in pursuance of formal notifications given by those Governments.

The treaty with Great Britain of 1794, terminated by limitation, in addition to the usual list of arms and munitions of war, omitted horses but included saltpeter and also timber for shipbuilding, tar or rosin, copper in sheets, sails, hemp, and cordage, and generally whatever may serve directly to the equipment of vessels, unwrought iron and fir planks only excepted. The treaty further agrees that provisions and other articles not generally contraband becoming so "according to the law of nations," and seized for that reason, shall not be confiscated for that reason, but the owners shall be speedily and completely indemnified.

It follows, then, that the United States at present hold defined and limited agreements as to contraband with Bolivia, Colombia, Santo Domingo, Ecuador, France, Guatemala, Haiti, the Netherlands, Italy, Mexico, Prussia, Salvador, Spain, Sweden and Norway, and Venezuela.

With other nations than those named above the United States have no agreement as to contraband goods, and the prize courts would determine according to public law the character of merchandise shipped to enemy's ports.[1]

Judge Betts, in the *Peterhoff* case, said:

> The practice in prize proceedings in the courts of the United States is governed by the rules of admiralty law disclosed in the English reports, when not regulated by decisions or rules of the American courts.

In this and other cases it was held by the courts of the United States that destination to a neutral port will not protect from capture articles of contraband where an ultimate destination to the enemy's country or blockaded port can be shown, the immediate neutral destination being used only to cover the transaction.[2]

(*c*) *Penalty of carrying contraband.*—Halleck says:

> The inception of the voyage is held to complete the offense; and from the moment that the vessel with the contraband articles on board quits her port on a hostile destination the capture may be legally made. It is by no means necessary to wait till the ship and goods are actually endeavoring to enter the enemy's port. The voyage being illegal[3] at its commencement, the penalty immediately attaches and continues to the end of the voyage, or at least so long as the illegality exists.

In the case of Carrington *v.* Merchants' Insurance Co. it was decided that when the contraband goods have been deposited at the port of destination neither the vessel nor the cargo is liable to seizure on the

[1] Glass, International Law, pp. 472–474.

[2] See case of Stephen Hart, Snow, p. 515.

[3] That is, from the standpoint of the belligerent whose interests are likely to be injuriously affected by the voyage.

return voyage, though the new cargo may have been purchased with the proceeds of the contraband.

As to indirect voyages, Judge Betts, in his decision in the case of the *Stephen Hart*, which contains on the whole the clearest and most forcible statement of the principles and circumstances involved in what is known as continuous voyages, says:

> This court holds that in all such cases the transportation or voyage of the contraband goods is to be considered as a unit, from the port of lading to the port of delivery in the enemy's country; that if any part of such voyage or transportation be unlawful, it is unlawful throughout; and that the vessel and her cargo are subject to capture as well before arriving at the first neutral port at which she touches after her departure from England as on the voyage or transportation by sea from such neutral port to the port of the enemy.

The extent of the liability to capture being thus shown, the question of the penalty arises. In regard to this, Kent says:

> When goods are once clearly shown to be contraband, confiscation is the natural consequence. This is the practice in all cases, as to the article itself, excepting provisions; and as to them, when they become contraband, the ancient and strict right of forfeiture is softened down to a right of preëmption on reasonable terms. But generally to stop contraband goods would, as Vattel observes, prove ineffectual relief, especially at sea. The penalty of confiscation is applied in order that the fear of loss may operate as a check on the avidity for gain and deter the neutral merchant from supplying the enemy with contraband articles. The ancient custom was to seize the contraband articles and keep them on paying their value. But the modern practice of confiscation is far more agreeable to the mutual duties of nations, and more adapted to the preservation of their rights. It is a general understanding, grounded upon true principles, that the powers at war may seize and confiscate all contraband goods without any complaint on the part of the neutral merchant, and without any imputation of a breach of neutrality in the neutral sovereign himself. It was contended on the part of the French nation in 1796 that neutral governments were bound to restrain their subjects from selling or exporting articles, contraband of war, to the belligerent powers. But it was successfully shown, on the part of the United States, that neutrals may lawfully sell at home to belligerent powers contraband articles, subject to the right of seizure *in transitu*. This right has since been explicitly declared by the judicial authority of that country. The right of the neutral to transport and of the hostile power to seize are conflicting rights, and neither party can charge the other with a criminal act.

As to the neutral carrier, Dana says:

> By the present practice of nations, if the neutral has done no more than carry goods for another which are in law contraband, the only penalty upon him is the loss of his freight, time, and expenses. If he makes use of fraudulent devices to mislead the belligerent, and defeat or impair the right of search, he is liable to condemnation for unneutral acts in aid of the enemy. So, if he not only carries contraband goods but engages in a contraband service. * * * But if she (the vessel) has no relations with the enemy's government, and, as a private merchant vessel, is carrying goods on private account, as merchandise, to the enemy's ports, to be put into the market there or delivered into private hands, she is not, as the practice is now settled, liable to condemnation, whatever be the character of her cargo. * * *
>
> The interests of peace and commerce on the one hand, and those of war on the other, have, in the conflict of their forces, rested at a practical line of settlement. The interests of peace have prevailed so far as to permit the carrier to transport contraband goods, subject to no other penalty than the loss of his commercial enterprise, i. e., his freight and expenses, while the interests of war have prevailed so far as to permit the belligerent to stop the contraband goods on their passage and convert them to his own use. The advantage of this is that the carrying trade of the world may go on, subject to an ascertainable risk, which may be provided for by contract and guarded against by insurance; and producers and merchants can continue their business and procure transportation without criminality, taking the risk of the capture and condemnation of noxious articles. At the same time the belligerents have the further security of being able to condemn all the interests involved, whether vessel or cargo, if there have been fraudulent practice or hostile service.

Chief Justice Chase, in the *Peterhoff* case, says:

> It is an established rule that the part of the cargo belonging to the same owner as the contraband portion must share its fate. This rule is well stated by Chancellor

Kent thus: "Contraband articles are infectious, as it is called, and contaminate the whole cargo belonging to the same owners, and the invoice of any particular article is not usually admitted to exempt it from general confiscation."

So much of the cargo of the *Peterhoff*, therefore, as actually belonged to the owner of the artillery harness and the other contraband goods must be also condemned.

Lord Stowell had previously, in the "*Staadt Embden*," said that in his opinion the law of nations required that innocent articles, to escape the contagion of contraband articles of a cargo, must be the property of a different owner.

It is the current practice, where the ship and the contraband articles of the cargo belong to the same owners, to confiscate the vessel with these articles. Ortolan differs from the common ruling upon this subject by advocating the release of the vessel carrying the contraband even if owned by the same owners.

The United States, in a treaty with France in 1800, which expired in 1808, and with Sweden, the Central American Republics, Mexico, Venezuela, Peru, Ecuador, and New Granada, at other times, have established the practice, as between the United States and those countries, of allowing the continuance of the voyage of the neutral carrier of contraband, if he abandons the contraband on board of the belligerent. This would of course mean a quantity sufficiently small to be received by the captor.

Hall says that it can scarcely be believed that the vitality of such a practice could stand the test of a serious maritime war, while Dana says:

As the captor must still take the cargo into port and submit it to adjudication, and as the neutral carrier can not bind the owner of the supposed contraband not to claim it in court, the captor is entitled for his own protection to the usual evidence of the ship's papers and whatever other evidence induced him to make the capture, as well as the examination on oath of the master and supercargo of the vessel. It may not be possible or convenient to detach all the papers and deliver them to the captor, and certainly the testimony of the persons on board can not be taken at sea in the manner required by law.

Dana goes on to say that a strong argument might be made from these considerations that the clauses in the treaties containing this rule can only be applied to cases where there is the capacity on the part of the neutral vessel to insure the captor against a claim on the goods. In any case the contraband articles are not legal prize until condemned. Mr. Dana's argument as to the treaties with the American Republics extends also to the peculiar provisions of the treaty with Prussia.

By the treaty with Prussia of 1799, continued in part by that of 1828, it was agreed that even articles directly contraband should not be confiscated. Vessels of either party having contraband on board, may be stopped and detained as long as the belligerent judges necessary to protect himself from the effects of the delivery of the contraband to the enemy, but the neutral proprietors are to receive a reasonable compensation for the loss occasioned by the detention. Or the captor may take any or all of the contraband merchandise for his own use, paying for it the market price at the port of destination. The treaty contains the same stipulations for the freedom of the vessel on delivery of the contraband to the captor as is found in other treaties cited.[1]

There is one penalty or restriction yet to be referred to, and that is what is known as the preëmption of contraband articles. Hall says:

In strictness, every article which is either necessarily contraband, or which has become so from the special circumstances of the war, is liable to confiscation; but it is usual for those nations who vary their list of contraband to subject the latter

[1] Glass, International Law, p. 402.

class to preëmption only, which by the English practice means purchase of the merchandise at its mercantile value, together with a reasonable profit, usually calculated at 10 per cent on the amount. This mitigation of extreme belligerent privileges is also introduced in the case of products native to the exporting country, even when they are affected by an inseparable taint of contraband.

(*d*) *Persons and dispatches as contraband.*—The carrying of certain persons and dispatches by neutrals for belligerent purposes is not really a contraband act, but is sufficiently like such an act to be generally discussed under the head of contraband of war. Hall places acts and adventures of this kind under a distinct head, namely, "Analogues of contraband." Dana and T. J. Lawrence speak of them as unneutral acts, the latter giving the distinct title of "Unneutral service" to such acts.

Hall says further that they differ from contraband acts by a closer connection and association with the belligerent than can be affirmed by the mere transport of contraband of war; and, as Lawrence's title suggests, the acts are more in the nature of a direct service to a belligerent than that involved in the transporting of merchandise for sale to a good market. These acts are not violations of neutrality that involve the neutral State, as they are done either beyond the jurisdiction of such State or with so much secrecy that they can not readily be known or prevented. Woolsey says:

If the obligations of neutrality forbid the conveyance of contraband goods to the enemy, they also forbid the neutral to convey to him ships, whether of war or of transport, with their crews, and still more to forward his troops and dispatches. These have sometimes been contraband articles. * * * But in truth, as Heffter remarks, they are something more than contraband, as connecting the neutral more closely with the enemy. A contraband trade may be only a continuation of one which is legitimate in peace, but it will rarely happen that a neutral undertakes in time of peace to send troops of war to another nation, and the carrying of hostile dispatches implies a state of war.

A neutral vessel which is used as a transport for a belligerent is subject to confiscation upon capture by the other belligerent, and the military or naval persons become prisoners of war. It is immaterial whether the vessel be a transport by voluntary contract or otherwise, and it is also immaterial whether the number of persons carried be great or small. As Wheaton says, "to carry a veteran general, under some circumstances, might be a much more noxious act than the conveyance of a whole regiment."

In the case of the *Orozembo*, in 1807, an American vessel chartered to convey three military persons of distinction and two civil officials, the vessel was condemned by Sir William Scott. In this case, as in that of the *Friendship* and the *Caroline*, the offense was rather one of engagement of the vessel as an enemy transport than a mere carrying of the military persons of the enemy as passengers. An English court in 1855 went so far during the Crimean war as to condemn a Bremen ship, the *Greta*, for carrying 270 shipwrecked Russian officers and seamen from a Japanese to a Russian harbor. Hall says:

In the transport of persons in the service of a belligerent the essence of the offense consists in the intent to help him; if, therefore, this intent can in any way be proved, it is not only immaterial whether the service rendered is important or slight, but it is not even necessary that it shall have an immediate local relation to warlike operations. It is possible for a neutral carrier to become affected by responsibility for a transport effected to a neutral port, and it may perhaps be enough to establish liability that the persons so conveyed shall be in civil employment.

Concerning this statement it may be well to remark that the nature of the act should be held as sufficient evidence of the intent of the neutral individual.

Says Sir William Scott:

The carrying of two or three cargoes of military stores is necessarily an assistance of limited nature, but in the transmission of dispatches may be conveyed the entire plan of a campaign that may defeat all the plans of the other belligerent in that part of the world. * * * It is impossible to limit a letter to so small a size as not to be capable of producing the most important consequences. It is a service, therefore, which, in whatever degree it exists, can only be considered in one character—as an act of the most noxious and hostile nature. The offense of fraudulently carrying dispatches in the service of the enemy being then greater than the carrying of contraband under any circumstances, it becomes absolutely necessary, as well as just, to resort to some other penalty than that inflicted in cases of contraband. The confiscation of the noxious article, which constitutes the penalty in contraband where the vessel and cargo do not belong to the same person, would be ridiculous when applied to dispatches. There would be no freight dependent on their transportation, and therefore this penalty could not, in the nature of things, be applied. The vehicle in which they are carried must therefore be confiscated.[1]

Hall, discussing the question of mail and other regular steamers, says:

If a neutral, who has been in the habit, in the way of his regular business, of carrying post bags to or from a belligerent port, receives sealed dispatches with other letters in the usual bags, or if he receives a separate bundle of dispatches without remuneration, he can not be said to make a bargain with the belligerent, or to enter his service personally for belligerent purposes. He can not be said to have done an act of trade, of which he knows the effect will be injurious to the other belligerent. Dispatches may be noxious, but they may also be innoxious, and the mere handing of dispatches to him in the ordinary course of business affords him no means of judging of their quality. A neutral, accepting dispatches in this manner, can not therefore be subjected to a penalty. When, again, a neutral, in the way of his ordinary business, holds himself out as a common carrier, willing to transport everybody who may come to him, for a certain sum of money, from one specified place to another, he can not be supposed to identify himself specially with belligerent persons in the service of the State who take passage with him. * * *

Vessels not being subject to a penalty for carrying dispatches in the way of ordinary business, packets of a regular mail line are exempted as of course, and merchant vessels are protected in a like manner, when, by municipal regulations of the country from the ports of which they have sailed, they are obliged to take on board all government dispatches or letters sent from the post-offices.

The great increase which has taken place of late years in the number of steamers plying regularly with mails has given importance to the question whether it is possible to invest them with further privileges. At present, although secure from condemnation, they are no more exempted than any other private ship from visit; nor does their own innocence protect their noxious contents, so that their post bags may be seized on account of dispatches believed to be within them. But the secrecy and regularity of postal communication is now so necessary in the intercourse of nations, and the interests affected by every detention of the mail are so great, that the practical enforcement of the belligerent right would soon become intolerable to neutrals. Much tenderness would no doubt be shown in a naval war to mail vessels and their contents, and it may be assumed that the latter would be seized under very exceptional circumstances. France, in 1870, directed its officers that "when a vessel subject to visit is a packet boat engaged in postal service, and with a government agent on board belonging to the State of which the vessel carries the flag, the word of the agent may be taken as to the character of the letters and dispatches on board." It is likely that the line of conduct followed on this occasion will serve as a model to other belligerents. At the same time it is impossible to overlook the fact that no national guarantee of the innocence of the contents of the mail can readily be afforded by a neutral power. No government could undertake to answer for all letters passed in the ordinary way through its post-offices. To give immunity from seizure as of right to neutral mail bags would therefore be equivalent to resigning all power to intercept correspondence between the hostile country and its colonies, or distant expeditions sent out by it, and it is not difficult to imagine occasions when the absence of such power might be a matter of grave importance. Probably the best solution of the difficulty would be to concede immunity as a general rule to mail bags upon a declaration in writing being made by the agent of the neutral government on board that no dispatches are being carried for the enemy, but to permit a belligerent to examine the bags upon reasonable grounds of suspicion being specifically stated in writing.

[1] Wheaton, 635, 636.

During our civil war our naval officers were directed in the case of the capture of mail steamers to forward the mail bags unopened to their destination.

Dana sums up the whole subject of carrying persons and dispatches by giving three rules which he claims to be in accord with the decisions of English prize courts and with the policy of the English Government, as well as with the decisions of the prize courts and national acts of other States. They are:

(1) If the vessel is in actual service of the enemy as a transport, she is to be condemned. In such case it is immaterial whether the enemy has got her into his service by voluntary contract or fraud. It is also in such case immaterial what is the number of the persons carried or the quantity or character of the cargo; and, as to dispatches, the court need not speculate on their immediate military importance. It is also unimportant whether the contract, if there be one, is a regular letting to hire, giving the possession and temporary ownership to the enemy, or a simple contract of affreightment. The truth is, if the vessel is herself under the control and management of the hostile government, so as to make that government the owner *pro tempore*, the true ground of condemnation should be as enemy's property. The interpretation of this technical phrase of prize law will cover all such cases.

(2) If a vessel is not in the enemy's service, still, if the master knowingly takes for the enemy's government or its agents persons or papers of such a character or destination that the transporting of them under the neutral flag is an actual belligerent service to the State, it is an unneutral act which forfeits the vessel. If he avers ignorance of the character of the persons or papers, all the circumstances are to be considered for the purpose of determining not only the truth of his averment, but whether his ignorance, though real, is excusable. He is bound to a high degree of diligence in such cases, and if the circumstances fairly put him on inquiry, which he does not properly pursue, he will not be discharged. Among those circumstances are the character of the dispatch, as far as shown from itself, the circumstances attending its delivery or custody, and the character of the ports of departure and destination of the vessel as being neutral or hostile. In the case of a vessel not in the enemy's service, but doing such acts for his benefit, can she be said to be enemy's property *pro hac vice*?

(3) It is not an unneutral intervention, entailing a penalty, to knowingly carry a dispatch of a character recognized as diplomatic in the international intercourse of States. Of this class is a dispatch passing either way between the enemy's home government and its diplomatic agent in a neutral country, or between a neutral government and its diplomatic agent in an enemy's country; and consuls-general come within the privilege of this rule. But if the dispatches are placed within a private vessel of the nation with whom the ambassador's nation is at war, and she is captured by a cruiser of the former nation, the dispatches have no immunity.

As to the cases mentioned under this last grouping, it may be said that the dispatches from a neutral diplomatic agent to a belligerent, or *vice versa*, should be exempt from seizure upon the ground also that they may be as important to the interests of the neutral as to the interests of the belligerent State, and hence their transmission, as Dana says, is not an unneutral act.

The case of the *Trent* comes under this general head. The *Trent* was one of a line of English mail steamers plying between Havana and St. Thomas, there connecting with a line for England. At an early stage of our civil war, in 1861, Messrs. Mason and Slidell, with their secretaries, took passage on board the *Trent* at Havana for England. These gentlemen had been appointed as diplomatic agents by the Confederate Government to England and France, and had with them dispatches and instructions which were under their personal charge.

The *Trent* was overhauled on the high seas by the U. S. S. *San Jacinto*, and Messrs. Mason and Slidell, with their secretaries, forcibly removed from the *Trent*, their dispatches being secretly given to some of the passengers to be taken to Europe. There was no evidence or charge that the commander of the *Trent* aided in the concealment or forwarding of these dispatches. He denied the right of search by the cruiser, obstructed in every way the acts of Captain Wilkes, and yielded

only to superior power. Captain Wilkes permitted the *Trent* to proceed and took Messrs. Mason and Slidell as prisoners to the United States. The act of Captain Wilkes was unauthorized by our Government, and upon demand by the British Government the persons were surrendered. Mr. Seward admitted that these persons could not lawfully be taken from the *Trent* at sea, but contended that she might have been brought in as a prize.[1]

Mr. Dana says in regard to this affair:

This celebrated case can be considered as having settled but one principle, and that had substantially ceased to be a disputed question, viz, that a public ship, though of a nation at war, can not take persons out of a neutral vessel at sea, whatever may be the claim of her Government on those persons. It has been borne in mind that Earl Russell, in his demands, makes no reference to the diplomatic character of Mason and Slidell, or to any special right of exemption in this case. He presents the naked fact that a United States vessel of war had taken persons from an innocent British neutral vessel at sea. To his reclamation against such proceeding the United States were only too glad to assent, considering it a triumph of their own principles, secured by their own decision, made against a strong national feeling in the particular case on the demand of the only power that had ever contended for the opposite doctrine.

Woolsey makes the following comment upon the subject:

On this subject we may remark (1) that there is no process known to international law by which a nation may extract from a neutral ship on the high seas a hostile ambassador, a traitor, or any criminal whatever. Nor can any neutral ship be brought in for adjudication on account of having such passengers on board.

(2) If there had been hostile dispatches found on board, the ship might have been captured and taken into port; and when it had entered our waters, these four men, being citizens charged with treason, were amenable to our laws. But there appears to be no valid pretext for seizing the vessel. It is simply absurd to say that these men were living dispatches.

(3) The character of the vessel as a packet ship, conveying mails and passengers from one neutral port to another, almost precluded the possibility of guilt. Even if hostile military persons had been found on board, it might be a question whether their presence would involve the ship in guilt, as they were going from a neutral country and to a neutral country.

(4) It ill became the United States, a nation which had ever insisted strenuously upon neutral rights, to take a step more like the former British practice of extracting seamen out of neutral vessels upon the high seas than like any modern precedent in the conduct of civilized nations, and that, too, when she had protested against this procedure on the part of Great Britain and made it a ground of war. As for the rest, this affair of the *Trent* has been of use to the world by committing Great Britain to the rule of neutral rights upon the seas.

As to the positions held by Messrs. Mason and Slidell as ambassadors or diplomatic agents, it may reasonably be held that their immunities hold good whether they are agents of a recognized State or only of a *de facto* government accredited to a neutral State which has recognized the *de facto* government as such.

Sir Sherston Baker, in examining the question, says:

The rule, therefore, to be collected from these authorities is, that you may stop an enemy's ambassador in any place of which you are yourself the master, or in any other place where you have a right to exercise acts of hostility. Your own territory or ships of your own country are places of which you are yourself the master. The enemy's territory or the enemy's ships are places in which you have the right to exercise acts of hostility. Neutral vessels, guilty of no violation of the laws of neutrality, are places where you have no right to exercise acts of hostility.

[1] A full account of the case is given in Snow's Cases, p. 488, etc., and the full text of Lord Russell's discussion of the international law bearing upon the subject after the surrender of these persons will be found in Wharton's Digest, Vol. III, p. 441, etc. The matter is fully discussed by Mr. R. H. Dana in his edition of Wheaton Int. Law, p. 644, etc., and more briefly by Sir Sherston Baker in his edition of Hallec k Int. Law, p. 324, etc.

CHAPTER XI.

BLOCKADE; RULE OF WAR OF 1756; RIGHT OF SEARCH.

SECTION 62.—BASIS AND CHARACTER OF BLOCKADES.

Blockades may be either military or commercial, or may partake of the nature of both. As military blockades, they may partake of the nature of a land or land and sea investment of a besieged city or seaport, or they may consist of a masking of an enemy's fleet by another belligerent fleet in a port or anchorage where commerce does not exist.

As commercial blockades, they may consist of operations against an enemy's trade and revenue, either localized at a single important seaport, or as a more comprehensive strategic operation, by which the entire sea frontier of an enemy is placed under blockade. A measure of this kind was applied by the British in the war of 1812 to our Atlantic coast, and by the Federal Government in the civil war to our Southern Atlantic and Gulf coasts. A measure of this kind is a war operation of vital importance, conducing strongly to a successful peace, not only by the suppression of that part of a nation's revenue arising from customs duties, but by causing a cessation or great reduction of the export of the great products of the country, upon the movement and sale of which so much of the prosperity and the livelihood of its citizens depend. It may also cut off the supply or the imported part of the supply of the materials requisite for the effective conduct of the war.

Efforts have been made to do away with commercial blockades by neutral nations. The United States at one time advocated such abolition, but afterwards, during the period of the civil war, established the largest commercial blockade ever known. Of this blockade Dana says:

> It extended from the Potomac to the Rio Grande, both on the Atlantic coast and the Gulf of Mexico, over a stretch of over 3,000 miles. Except at Charleston, the blockading force made no attempt to reduce the cities blockaded. Not more than one of the ports, and that only for a portion of the time, was a naval station of the enemy. None of them were military or fortified towns, unless every town is such which is defended at all, and none of the ports except Charleston, and for a short time one or two others, were subjects of direct military operations looking to their siege or reduction. This vast blockade for four years was purely commercial. The great aid it contributed toward the diminution of the resources of the enemy, their exhaustion and final surrender, and the now generally recognized necessity for it, have doubtless been instructive to America and the rest of the world. It has been shown that there may be wars in which such a blockade may be extremely useful, if not necessary. At the same time it has shown that a blockade commercial in its immediate action may be a necessary part of a large system of military strategy in its more remote relations. The strategy was to surround the entire rebel territory by sea and land, force it in upon itself, reducing its proportions and resources, and making advances into its interior from the seacoast or by land at such points as should be selected. The blockade of the entire coast did not only cut off the commerce and shut in the naval force of the enemy, but compelled them to maintain military forces to defend ports from possible attacks of the ships, so diverting their strength from the immediate scenes of operations by the armies.

Charleston was, as Mr. Dana suggests, an example of a sea investment or military blockade and a commercial blockade combined. In cases of this kind a much larger blockading force is necessary, partly to carry on the attack upon the enemy's fortifications, and also because these fortifications assist the entrance of the blockade runners.

A blockade being an operation of war, any government, independent or *de facto*, whose rights as a belligerent are recognized, can institute it as an exercise of those rights.

The circumstances of a land and sea blockade are very different, one being carried on in territory of which the blockader is in possession, while the other extends over both marginal waters and the high seas. The sea being the highway of all nations, the blockade with which international law is chiefly concerned—since it involves the relations of belligerents with neutrals, especially with the neutrals as individuals—is the sea or maritime blockade.

The neutral has the general right of trade and access to a belligerent unless this right comes in contact with the special needs and operations of the other belligerent; but these needs and blockades, as in other matters of the kind, must be duly set forth and carried on under certain rules and usages in conformity with the law of nations.

Among the first of the rules is the one that the blockade must be properly instituted, and sufficiently made known to all likely to be affected by its institution. Says Halleck:

> The institution of a siege or blockade is a high act of sovereignty, and must proceed either directly from the government of the State or from some officer to whom the authority has been expressly or impliedly delegated.

Notification of blockade.—Kent says:

> It is absolutely necessary that the neutral should have had due notice of the blockade in order to affect him with penal consequences of a violation of it. This information may be communicated to him in two ways—either actually, by a formal notice from the blockading power, or constructively, by notice to his government, or by the notoriety of the fact. It is immaterial in what way the neutral comes to the knowledge of the blockade. If the blockade actually exists and he has a knowledge of it, he is bound not to violate it. A notice to a foreign government is a notice to all the individuals of that nation; and they are not permitted to aver ignorance of it, because it is the duty of the neutral government to communicate the notice to their people.

There is a difference in the usage of nations as to the amount of notification necessary to be given to neutrals. The practice of the United States and Great Britain, which is followed by Germany and Denmark, is to recognize two kinds of blockade, one *de facto*, which begins and ends with the fact and which condemns no vessel attempting to enter the harbor unless previously warned off, and the other a blockade of which notice is duly promulgated and accompanied by the fact. In the latter case it is to be presumed that the blockade continues until notice to the contrary is given by the blockading State. In this case ignorance of the blockade is not accepted as an excuse for sailing for the blockaded port or an appearance in its vicinity. Being bound to a blockaded port is considered evidence, under ordinary circumstances, of an intention to violate the blockade.

The French practice, which is also followed by Italy, Spain, and Sweden, is to give a notification from the government of the blockading State and a notice from a vessel of the blockading force of a port. Each neutral vessel is individually warned by one of the blockading squadron, a vessel not blockading being considered incompetent to warn the vessel. The warning is indorsed on the ship's papers, with

date and locality, and only on subsequent attempts to enter is the vessel liable to seizure. Comparing the two methods, Hall says:

> The theory accepted in England and the United States is the natural parent of a more elastic usage. Notification is a convenient mode of fixing a neutral with knowledge of the existence of a blockade, but it is not the necessary condition of his liability to seizure. In strictness, if a neutral vessel sail with the destination of a blockaded port from a place at which the fact of the blockade is so notorious that ignorance of its existence is impossible, confiscation may take place upon seizure without previous warning. But in practice, notification of some sort is always given. If the blockade is instituted under the direct authority of the government, the fact of its commencement is notified to foreign States. The information thus communicated affects their subjects, who must be supposed to be put in possession of the knowledge which is afforded with the express object of its being communicated to them.

Furthermore, if approach for inquiry or for warning were permissible in these days of fast steamers, "it will be readily seen," as Judge Field observed, "that the greatest facilities would be afforded to elude the blockade."

The President's proclamation of blockade of April 19, 1861, stated in general terms that neutral vessels would be individually notified at each blockaded port, but Commodore Pendergrast, commanding the North Atlantic blockading squadron, in giving notice of the actual commencement of the blockade under the President's proclamation, limited the warning to vessels in ignorance of the existence of the blockade. This construction of the President's proclamation was not disavowed by the Government and was upheld by the courts of the United States in the prize cases brought before them.

Judge Grier ruled:

> A vessel which has full knowledge of the existence of a blockade before she enters upon her voyage has no right to claim a warning or indorsement when taken in the act of attempting to enter. It would be an absurd construction of the President's proclamation to require a notice to be given to those who already had knowledge. A notification is for those only who have sailed without a knowledge of the blockade and get that first information from the blockading vessels.

After these decisions were made this usage became settled and accepted, and no complaints were made against this construction of the proclamation of the President, and under it, says Dana, "the law respecting notice of blockades was applied as heretofore in the English and American courts."

Vessels at sea when the notification of the blockade is promulgated, or vessels which for any sufficient reason are ignorant of the blockade of any port, are entitled to a special warning or notification at the line of blockade.

This special warning is accompanied, if possible, by signed entry of the fact of the warning upon the ship's certificate of registry, to which is usually added the name of the warning vessel, the date, and the latitude and longitude of the place of warning. If not able to board, a verbal order or warning is sufficient. After this warning the neutral is bound to show by his acts his intention to obey at once the warning received. If after a short delay there is reason to suppose that he is not pursuing a course to take him away from the vicinity of the port, a capture may reasonably follow.

Blockades as a rule are instituted to prevent both ingress and egress, and it is a settled usage that a vessel in a blockaded port is presumed to have notice of a blockade as soon as it has been commenced. The vessel is allowed to come out, however, with the cargo which was on board when the blockade was instituted, and a period of fifteen days is generally allowed after the commencement of the blockade before the egress of a vessel is a breach of blockade.

What constitutes an effective blockade.—Halleck says:

It is now a well-settled principle of international jurisprudence that a lawful maritime blockade of a port requires the actual presence of the blockading force. A mere proclamation of notification of one belligerent that such a port of the other belligerent will be blockaded at such a time, and thus closed to neutral commerce, is not sufficient to constitute a legal blockade; the force must be actually present at the entrance to the port, or sufficiently near to prevent communication. Nor is the mere presence of the hostile force sufficient of itself to make the blockade a legal one; it must not only be actually present, but it must be large enough to prevent communication, or at least to render it dangerous to attempt to enter the port.

The actual force necessary to maintain an effective blockade varies with the circumstances. A treaty between France and Denmark, concluded in 1742, required that the entrance of a port should be closed by at least two vessels, or by a battery on shore. A later treaty between Holland and the Two Sicilies required the presence of at least six vessels at the distance of a little more than gunshot from the port, or the existence of batteries on shore so placed that entry could not be made except by passing under the guns of the besieger.

The Declaration of Paris in 1856 prescribed:

Blockades to be obligatory are to be effective, that is to say, maintained by a sufficient force to shut out the access of the enemy's ships and other vessels in reality.

The United States were not a party to this declaration, and have at a later date agreed to a clearer and more satisfactory definition of an effective blockade. This definition is found in the treaty of 1871 between Italy and the United States. By its terms:

It is expressly declared that such places only shall be considered blockaded as shall be actually invested by naval forces capable of preventing the entrance of neutrals, and so stationed as to create an evident danger on their part to attempt it.[1]

The following instructions were given by the United States Navy Department in 1846 to the commanding officer in the Pacific:

A lawful maritime blockade requires the presence of a sufficient force situated at the entrance of the ports, sufficiently near to prevent communication. The United States have at all times maintained these principles on the subject of blockade, and you will take care not to attempt the application of penalties for a breach of blockade except in cases where your right is justified by these rules. You should give public notice that, under Commodore Stockton's general notification, no port on the west coast of Mexico is regarded as blockaded unless there is a sufficient American force to maintain it actually present, or temporarily driven from such actual presence by stress of weather, intending to return.

It was decided in the case of the *Circassian*[2] that a blockade may be made effective by batteries on shore as well as by ships afloat, and, in case of an inland port, may be maintained by batteries commanding the river or inlet by which it may be approached, supported by a naval force sufficient to warn off innocent and capture offending vessels attempting to enter.

An occasional evasion of a blockade does not prevent it from being effective. Lord Russell, after consultation with the law officers of the Crown, wrote as follows to the British minister at Washington in 1862 concerning our blockade during the civil war:

Her Majesty's Government are of the opinion that, assuming that the blockade is duly notified, and also that a number of ships are stationed or remain at the entrance of a port, sufficient really to prevent access or to create evident danger on entering or leaving it, and that these ships do not voluntarily permit ingress or egress, the fact that various ships may have successfully escaped through it will not in itself prevent the blockade from being an effective one by international law.

[1] United States Treaties, 1873, Italy, p. 507. [2] 2 Wall, 135.

Hall says further on this subject:

> Provided that access is in fact interdicted, the distance at which the blockading force may be stationed from the closed port is immaterial. Thus Buenos Ayres has been considered to be effectually blockaded by vessels stationed in the neighborhood of Montevideo; and during the Russian war in 1854 the blockade of Riga was maintained at a distance of 120 miles from the town by a ship in the Lyser Ort, a channel 3 miles wide, which forms the only navigable entrance to the gulf.

The difficulty of blockading certain ports during our civil war may be appreciated when it is stated that the blockade of the port of Wilmington in 1864 required a force of 50 vessels, all of speed, and some of them the fastest in the United States Navy.

The permissible exception to the general rule which requires the presence of an adequate force to make a blockade effective is the temporary absence of the blockading vessels through stress of weather. But this must not be prolonged unreasonably, and if the vessels are unable to resume their stations on account of serious injuries the effect will be the same as if the blockading force had been driven away by a superior force of the enemy.

A blockade is raised when an enemy's force succeeds in driving off the vessels engaged in the blockade or when the blockading vessels are withdrawn by the government instituting the blockade. But in case of hostile attack it must be shown without question that all of the blockading vessels were driven from their stations off the port. In this case the same notice is required for a renewal as for the original establishment of the blockade.

A blockade whose establishment has been regularly notified to neutral governments must be presumed to continue until notification is given by the blockading government of a discontinuance, unless clear proof to the contrary can be shown.

In the case of the *Nancy* (Snow's Cases, p. 494) it was held by the privy council of Great Britain in 1809 that where the blockading force is temporarily absent from the port blockaded, in order to accomplish other objects, no penalty attaches to a vessel which enters and leaves the port during such absence. In this case it was held that the periodical appearance of the vessel in the offing could not be supposed to be a continuation of a blockade which had been previously maintained by a number of vessels and with such rigor that no vessel had been able to enter the island (of Martinique) during its continuance.

If the blockading force becomes insufficient and negligent in its blockade or partial in the execution of its duties toward individual ships or toward one nation more than another, the blockade may be ruled to be ineffective and void.

A constructive or paper blockade is one established by decree or proclamation only, without the actual presence of an adequate force to prevent the entrance of neutral vessels into the port supposed to be blockaded. Such a blockade is null and void, and captures made under it are no longer recognized as legal captures by any nation.

Says Woolsey:

> A blockade is not confined to a seaport, but may have effect on a roadstead or portion of a coast, or the mouth of a river. But if the river is a pathway to interior neutral territories, the passage on the stream of vessels destined for neutral soil can not be impeded.

For this reason, the Rio Grande could not be blockaded during our civil war.

Any public vessel of the belligerent power establishing a blockade is competent to capture ships that have run the blockade or are discovered

at sea bound for a port which is known to be blockaded. In the case of the *Memphis*[1] it was held that a capture was valid when made by a vessel not stationed at the blockaded port, as the blockade runner did not purge her offense by a successful act of fraud or deceit in preventing an arrest by the force supporting the blockade.

SECTION 63.—BREACH OF BLOCKADE.

A breach of blockade is not an offense against the laws of the country of the neutral owner or master. The only penalty for engaging in such trade is the liability to capture and condemnation by the belligerent. The use of the terms lawful or unlawful, innocent or noxious, in connection with neutral trade, has reference to the rights of the belligerent blockading State only, and to the liability of the neutral vessel concerned to capture or condemnation.

The acts which constitute a breach of blockade vary with the circumstances of the blockade and the time of occurrence. There is a difference also as to the usage of the different nations, the usage of the French being different from that of the English and Americans. As by far the greatest experience in blockades of late years has occurred to England and the United States, and as their courts have adopted virtually the same rules in dealing with violations of blockade, these rules will be followed in this work.

Halleck says:

> An actual entrance into a blockaded port is by no means necessary to render a neutral ship guilty of violation of the blockade. Indeed, such a construction would essentially defeat the very object of a blockade, by rendering the capture of a ship lawful only after such capture had ceased to be possible. Hence, it is universally held that an attempt to enter the port, knowing it to be blockaded, completes the offense to which the penalty of the law is attached. It is the attempt to commit the offense, which, in the judgment of the law, constitutes the crime, and is as much a breach of neutrality as an actual entrance into the prohibited port. It would be absurd to say that the penalty is not incurred till the unlawful design is fully accomplished, for the offender would, in most cases, be placed by its accomplishment beyond the reach of the law. Nor is the word "attempt" to be understood in a literal and narrow sense. It is not limited to the conduct of the ship at the mouth of the blockaded port, but is applicable to her whole conduct from the moment she has knowledge of the existence of the blockade and the consequent prohibition of neutral commerce. If she has this knowledge before she begins her voyage, the offense is complete the moment she quits her port of departure; if that knowledge is communicated to her during the voyage, the continued prosecution involves the crime and justifies the penalty; if it is not given to her until she reaches the blockading squadron, she must immediately retire or she is made liable to confiscation. It is not the mere mental intention that the law punishes, but it is the overt act by which the execution of an unlawful intent is begun. This overt act is the starting for, or proceeding toward, the prohibited port with the knowledge that it is blockaded.

The general rule thus given by Halleck has some exceptions. If a vessel sails from a distant country, she may clear provisionally for the blockaded port, and be exempt from the penalty of a breach of blockade if it be clearly and unmistakably shown that she was to go to an alternative destination in case it was ascertained by inquiry during the voyage that the blockade was still in force. Says Halleck:

> This fact may be shown by instructions to the master not to pursue the voyage unless by inquiry at a port of the blockading power, or of some other neutral State, he found that the blockade had ceased. These instructions to the master must clearly set forth the necessity of the previous inquiry, and the mode in which it has to be made, in order to furnish satisfactory proof of the intention of the parties.

[1] Blatchford, Prize Cases, pp. 261, 262.

An inquiry at the blockaded port is only justifiable when the master of the vessel is ignorant of the existence of the blockade.

Sir William Scott says:

A neutral merchant has no right to speculate on the greater or less probability of the termination of a blockade and, on such speculation, to send his vessel to the very mouth of the blockaded river or port, with instructions to enter if no blockading force appeared, otherwise to demand a warning and proceed to a different port. A rule that would permit this would be introductory of the greatest frauds.

Entering a blockaded port is of course a breach of blockade. If a neutral ship go in with a cargo, it is presumed that she goes in to deliver it; if the entry is made without a cargo the presumption is that she goes in to obtain one. If she comes out as she went in, the presumption of an intention to violate the blockade still remains.

A license from the government of the blockading nation is a sufficient justification to enter a blockaded port. A vessel in such a condition of distress as to require the safety and resources of the blockaded port may enter without violation of the blockade; but this necessity must be, Mr. Duer says in his work on insurance, "evident, immediate, pressing, and from its nature not capable of removal by any other means than by the course she had adopted."

As a rule, the act of egress during a blockade is a violation of blockade. This rule does not extend to a neutral vessel found in port when the blockade was first established, nor does it prevent egress to such a vessel with the cargo purchased in good faith and taken on board before the commencement of the blockade. But if even a portion of the cargo is taken on board after the establishment of the blockade is known the act is considered as a breach of blockade and justifies its penalty.

There are several other cases wherein the egress of a neutral vessel from the blockaded port is permitted. She may come out when the port was sought by reason of immediate distress or when for any reason she has the permission of the blockader to enter. Again, if it should happen that there is a well-founded expectation that the State to which the neutral vessel belongs is about to go to war with the State to which the blockaded port belongs the vessel may be allowed egress.

The time allowed for the egress of a ship in a blockaded port is generally fifteen days after the establishment of the blockade. Special circumstances may call for an extension of time, as when a river of great length is blockaded at its mouth or as in the case of New Orleans in 1861, when the very low water on the bar led the commanding officer of the blockading vessels to extend the period for vessels of deep draft.

The transport of goods through the mouth of a river under blockade by lighters or small vessels for the purpose of transfer and shipment for exportation by means of an outside vessel makes the latter vessel subject to capture and condemnation. If the vessel is in a port not blockaded and delivers or receives her cargo to or from a blockaded port by interior navigation or other transport the blockade is not violated. In regard to the return voyage from the blockade port Wheaton says:

The offense incurred by the breach of blockade generally remains during the voyage, but the offense never travels with the vessel further than to the end of the return voyage; although if she is taken during any part of that voyage, she is taken *in delicto*. This is deemed reasonable because no other opportunity is afforded to the belligerent cruisers to vindicate the offended law. But where the blockade has been raised between the time of sailing and capture, the penalty does not attach; because, the blockade being gone, the necessity for applying the penalty to prevent further transgression no longer exists. When the blockade is raised a veil is thrown over everything that has been done, and the vessel is no longer *in delicto*. The *delictum* may have been completed at one period, but it is by subsequent events done away.

In some cases of blockade mail steamers have been allowed immunity from the operations of the blockade, provided they gave pledges against carrying contraband of war. During the war against Mexico the United States blockading squadron allowed British mail steamers to enter and leave the port of Vera Cruz. During the blockades on the coast of South America it has been generally the custom to allow the mail steamers to continue their regular service under the condition that they were not to carry any contraband of war.

Mr. Wheaton, in a letter to Mr. Buchanan in 1846, said that neutral vessels of war have no privilege against blockade; and the fact that they can not be searched gives the blockading power the more right to require them to keep clear of the lines of the blockade. But the custom has been to permit free egress and ingress to neutral men-of-war. During our civil war this was allowed by special orders from the Federal Government and the privilege was extended to allow them to carry official dispatches not only for their own Government, but for other friendly Governments.

The custom has grown to be a general one to permit this entry on the part of a neutral man-of-war, and unless it interferes with the military or naval operations there seems to be no good reason to forbid it. Our own usage has almost invariably been in favor of this entry both to others and for ourselves, but it can not be said to have become a right.

All persons captured in prizes are to be well treated, and the vessel, with the witnesses prescribed by law, is to be sent by the captor in charge of a prize master and prize crew to the most suitable port of the blockading State for adjudication. The Revised Statutes of the United States bearing upon this subject are found in various sections, ranging from 4613 to 5441, and also articles 15, 16, and 17 of the Laws for the Government of the Navy of the United States. Says Chancellor Kent:

> The consequence of a breach of blockade is the confiscation of the ship, and the cargo is always *prima facie* implicated in the guilt of the owner or master of the ship, with whom it lies to remove the presumption that the vessel was going in for the benefit of the cargo and with the direction of the owner. Where, therefore, as in the case of the *Mercurius*, it may appear that the shippers at the time of the shipment could not have known of the blockade, though the ship be condemned, the cargo will be restored; but when at the time of the shipment the blockade either is or might be known to the owners of the cargo, who may therefore possibly be aware of an intention of violating the blockade, they will be considered as included by the illegal act of the master, although done without their privity or perhaps contrary to their wishes.

SECTION 64.—RULE OF WAR OF 1756.

During the war of 1756 the French, finding their colonial trade broken up by the British supremacy at sea, gave up their monopoly of that trade and allowed the Dutch, then neutrals, under special treaties to carry on the trade between France and her colonies. No other neutrals were allowed to engage in the trade and the licenses were for this special purpose only.

Many of the Dutch vessels engaged in this trade were captured by British cruisers and upon being sent into port for adjudication were condemned with their cargoes. The reason given for their condemnation was that under the circumstances these vessels were so much identified with the enemy by their special licenses and purposes as to be virtually in the employment of the French Government. They were, in the judgment of the prize courts of Great Britain, considered to be

the same as transports in the enemy's service and liable to condemnation upon the principles which applied to transports and vessels in general carrying military persons and dispatches.

This principle or practice of condemnation became known as the rule of war of 1756, and is defined by Wheaton as follows:

> Where a neutral is engaged in trade which is exclusively confined to the subjects of any country in peace or in war, and is interdicted to all others, and can not at any time be avowedly carried on in the name of the foreigner, such a trade is considered so entirely national that it must follow the hostile situation of the country.

Mr. Wheaton goes on to say:

> There is all the difference between this principle and the more modern doctrine which interdicts to neutrals, during war, all trade not open to them in time of peace, that there is between the granting by an enemy of special licenses to the subjects of the opposing belligerent, protecting their property from capture in a particular trade which the policy of the enemy induces him to tolerate, and a general exemption of such trade from capture. The former is clearly cause for confiscation, while the latter has never been deemed to have such an effect. The "Rule of the war of 1756" was originally founded upon the former principle; it was suffered to lie dormant during the war of the American Revolution, and when revived at the commencement of the war against France in 1793 was applied, with various restrictions and modifications, to the prohibition of all neutral traffic with the colonies and upon the coasts of the enemy. The principle of this rule was frequently vindicated by Sir William Scott in his masterly judgments in the high court of admiralty and in the writings of other British public jurists of great learning and ability. But the conclusiveness of their reasonings was ably contested by different American statesmen, and failed to procure the acquiescence of neutral powers in this prohibition of their trade with the enemy's colonies. The question continued a fruitful source of contention between Great Britain and those powers until they became her allies or enemies at the close of the war; but its practical importance will probably hereafter be much diminished by the revolution which has since taken place in the colonial system of Europe.

The British extension of the rule of 1756 to the practice known as the rule of 1793 caused great loss to American commerce and brought forth very earnest remonstrances from our Government. From the grounds then taken with respect to the latter rule (of 1793) there is no reason to believe that the Government of the United States will ever depart. The changed conditions both as to the colonial and coasting trades of Great Britain and other European powers, and as to the capture of neutral property at sea by the powers accepting the Declaration of Paris, lead us to believe that the rule of the war of 1756 is also obsolete.

SECTION 65.—CONTINUOUS VOYAGES.

Applied to the colonial and coasting trade.—By the rule of the war of 1756 neutrals were not permitted to engage in the direct trade between the enemy and his colonies. When in order to avoid this rule the neutral carrier touched at a neutral port, either of his own country or of another neutral State, it was decided by Lord Stowell, and the principle extended by Sir William Grant in the case of the *William* in 1806, that the vessel was still subject to condemnation. In this way the doctrine of continuous voyages was declared and made applicable to the colonial and by analogy to the coasting trade of the belligerent.

In the case of the *William*, the vessel arrived at Marblehead, Mass., from La Guayra on the 29th of May. On the 30th and 31st the goods were landed, weighed, and packed, and on the 1st of June the permit to reship them was obtained, and on the 3d of June the vessel was cleared for a Spanish port, La Guayra then being in a Spanish colony.

In this, as in all cases of continuous voyages, the intention is the controlling factor, and nothing was alleged to have happened between

the landing of the cargo and its reshipment that could have had any effect upon the determination of the destination.

The landing of the goods was held not to be a true importation into the United States, because it was admittedly done with the intention of immediate reshipment. The whole transport from La Guayra to Spain was therefore held to be a single continuous voyage.

This doctrine of continuous voyages, applied by the British courts, resulted adversely to certain American interests. When in turn it was adopted and somewhat extended by American courts during our civil war it bore severely on certain interests and adventures of English vessels.

Applied to the carriage of contraband and to the breach of blockade.—At the time just mentioned the rule of continuous voyages became the settled practice of the American prize courts. The leading cases under which that doctrine was enunciated were those of the *Bermuda*, the *Stephen Hart*, the *Peterhoff*, and the *Springbok*. This doctrine has not been accepted by continental publicists, and in the case of the *Springbok*, particularly, there has been dissent by some leading English and American writers. The latter vessel was captured while, at least in form, on a voyage from England to the English colonial port of Nassau, New Providence. The question of her liability to capture having been decided adversely to her neutral owners by our highest court, appeal was made to the English Government for a diplomatic settlement. The English Government referred the matter to its law officers, and the owner of the goods also obtained legal opinions. Sir Robert Phillimore, Sir Roundell Palmer, Sir Vernon Harcourt were among those consulted. The opinions given concur with the judgment of the Supreme Court, that the point upon which the question must turn was that of the original destination of the cargo. If they were intended to be sold at the neutral port of Nassau, to which the *Springbok* was bound, the goods would not be liable to seizure. But if it were originally intended that the goods should go beyond Nassau, and the voyage of the *Springbok* was in part fulfillment of that original design, then they were liable to capture.

The English lawyers, in reviewing the reasons given by the condemning court for holding this latter view, expressed the belief that these reasons were partly founded on mistake and partly consisted of erroneous deduction. A claim for compensation was then preferred, under the auspices of the British Government, by the owners of the cargo, before the international commission created to investigate this and numerous other claims. The commission was composed of an English and American member and was presided over by Count Corti, then minister of Italy at Washington, afterwards Italian minister of foreign affairs. This commission unanimously rejected the claim and sustained the decision of the Supreme Court of the United States, but without giving the reasons for its decision.

There seems to be but little question that the evidence as to the destination of the cargo should be definite. A presumption should not be sufficient. In the case of the *Springbok*, although only about one per cent of the cargo could be held as contraband, yet of that proportion there was no doubt as to its character. A review of this case, and incidentally of the question of continuous voyages, was made in 1878 by Hon. J. C. Bancroft Davis, formerly Assistant Secretary of State and later minister to Berlin, as a reply to a paper by Sir Travers

Twiss. This review fully answers the criticisms and objections raised by that learned writer.[1]

Judge Betts, in the case of the *Stephen Hart*, as previously remarked, gives the best statement of the doctrine. After holding that the mere touching at a neutral port, or even a transshipment, does not break the voyage if the intention on sailing was to carry contraband or break the blockade, he goes on to say:

The principles upon which the Government of the United States and the public vessels acting under its commission have proceeded, during the present war, in arresting vessels and cargoes as lawful prize upon the high seas are very succinctly embodied in the instructions issued by the Navy Department on the 18th of August, 1862, to the naval commanders of the United States. These instructions are therein declared to be a recapitulation of those theretofore from time to time given. The substance of them, so far as they are applicable to the present case, is that a vessel is not to be seized without a search carefully made so far as to render it reasonable to believe that she is engaged in carrying contraband of war for or to the insurgents and to their ports, directly or indirectly, by transshipment or otherwise violating the blockade.

The main feature of these instructions, so far as they bear upon the questions involved in the case, is but an application of the doctrine in regard to captures laid down by the Government of the United States at a very early day. In an ordinance of the Congress of the Confederation, which went into effect on the 1st of February, 1782 (5 Wheaton App., p. 120), it was declared to be lawful to capture and obtain condemnation of all "contraband goods, wares, and merchandise, to whatever nations belonging, although found in a neutral bottom, if destined for the use of the enemy."

In his introduction to the Manual of Naval Prize Law, drawn up for the use of officers of the British navy in 1866, Mr. Godfrey Lushington says:

Connected with the subject of contraband is the important question of the mode of ascertaining the destination of goods on board a vessel. In this volume it has been treated as conclusively determined by the destination of the vessel. This view is clearly to the interest of the neutrals. On the other hand, the interest of the belligerent when endeavoring to intercept contraband goods from going to the enemy is to look beyond the destination of the vessel to the destination of the goods. * * * Judged by principle, the view of the belligerent seems correct. A neutral vessel which forwards munitions of war part of their way to their ultimate destination to one of the belligerents is really aiding and abetting in the war, and this on the high seas. This view is maintained by Halleck, Duer, and Historicus, and was enforced by the American courts in the cases of the *Stephen Hart* and the *Commercen*.

But the decisions of the British courts, so far as they extend, have been in the opposite direction. The view of the neutral was supported in the case of the *Hendric* and the *Alida* and more recently in the case of Hobbs *v.* Henning. As to the last case, however, it is to be observed that the judgment of the court of common pleas was only upon the proceedings, and apparently rests on no other authority than that of Ortolan, an avowed advocate of neutral rights, on an abstract theory which is indifferent alike to positive decisions and general practice.

Sir Edward Creasy, in a long discussion of the matter, says:

In the administration of all law, international as well as municipal, realities and not shams are to be regarded. The artifice which is in fraud of a law is itself a breach of that law. Unquestionably there ought to be very full and clear proof of such artifice being practiced as well as planned. The burden of proof necessarily lies on the captors, who impute liability to seizure. Nay, more, the neutral destination of the ship ought to be looked on as a presumptive proof of the neutral destination of the cargo; and the evidence on behalf of the captors to outweigh such presumption ought to be very different in quality and amount from what it was

[1] In "Les Tribunaux de Prises des États-Unis," the title of the memoir referred to, Mr. Davis says: "L'examen des colis portés sur les connaissements Nos. 3 et 4 y a fait découvrir des couvertures grises et blanches à l'usage de l'armée, des boutons de marine marqués C. S. N. (Confederate States Navy), des boutons pour soldats, marqués A (artillerie), I (infanterie) et C (cavalerie), tous portant au côté l'estampille de 'Isaac Campbell & Co.' Il y avait aussi quelques sabres de cavalerie, des baïonnettes," etc., etc.

held sufficient in the case of the *Springbok*. But if full and clear evidence is adduced that the contraband goods are not destined for sale and consumption in the neutral market, but that the direct and primary object of their shipment was to forward them to or toward the enemy, then the belligerent against whom they were destined to be used has a right to protect himself by arresting and seizing the intended instruments of ill to him while they are on the seas, which are the highways of all nations but the territories of none.

Mr. Bancroft Davis, in his memoir, takes the ground that the doctrine of continuous voyages, although opposed by the continental publicists, is one held by the English and American courts; that is to say, by the courts of the principal maritime powers of the world, and hence, that this doctrine can not justly be regarded as one imposing special and onerous restrictions upon neutral commerce. The fact that the United States have been a defender of neutral rights in the past does not require them to advocate and justify a fictitious neutrality. In the case of the *Springbok* not only has the Supreme Court of the United States sustained the doctrine, but its decision has been maintained by the international tribunal to which final appeal was taken.[1]

Section 66.—Right of Search.

The right of visit and search a belligerent right.—Sir William Scott, in his decision in the *Maris* case, speaks of the right of search as follows:

The right of visiting and searching a merchant ship upon the seas—whatever be the ships, whatever be the cargoes, whatever be the destination—is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destination what they may, because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destination are, and it is for the purpose of ascertaining these facts that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture, because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can be legally captured, it is impossible to capture. * * * The right must unquestionably be exercised with as little of personal harshness and of vexation in the mode as possible, but soften it as much as you can, it is still a right of force, though of lawful force in something of the nature of civil process when force is employed, but a lawful force which can not be lawfully resisted.

In regard to the extent of this right of search, Dr. Woolsey says:

In the first place, it is only a war right. The single exception of this is that a nation may lawfully send a cruiser in pursuit of a vessel which has left its port under suspicion of having committed a fraud upon its revenue laws or some other crime. This is merely a continuation of a pursuit beyond the limits of maritime jurisdiction with the examination conducted outside these bounds, which, but for the flight of the ship, might have been conducted within. In the second place, it is applicable to merchant ships alone. Vessels of war, pertaining to the neutral, are

[1] The original text reads: "Ne pouvons nous pas logiquement conclure que les règles de conduite internationale sanctionnées depuis tant d'années par les deux principales puissances maritimes du monde ont en elles quelque chose qui s'adresse à ce sens commun élevé et qu'elles ne doivent pas être regardées exclusivement comme des restrictions onéreuses imposées au commerce neutre? * * * J'ai confiance que le jour est encore éloigné où les États-Unis cesseront d'être au premier rang parmi les défenseurs des droits des neutres de bonne foi. Le jour est encore plus éloigné où l'Amérique se fera le défenseur et le soutien d'une neutralité fictive. Dans votre mémoire, vous parlez de la fiction de la continuité du voyage. Qu'il me soit permis de penser que cette expression est plutôt applicable à la neutralité des parties qu'aux voyages qu'elles projettent et qu'elles entreprennent. Quand on se rappelle que le *Bermuda* a été condamné comme un vaisseau ennemi et n'a pas appelé de ce jugement, et que la décision de la plus haute cour nationale d'appel, qui a condamné le *Springbok*, a été maintenue en appel devant un tribunal international, on ne peut s'empêcher de croire que c'est abuser du mot "neutre" que de l'appliquer à ces parties." (Pp. 26, 27, Les Tribunaux de Prises des États-Unis, par J. C. Bancroft Davis.)

exempt from its exercise, both because they are not wont to convey goods, and because they are, as a part of the power of the State, entitled to confidence and respect. If a neutral State allowed or required its armed vessels to engage in an unlawful trade, the remedy would have to be applied to the State itself. To this we must add that a vessel in ignorance of the public character of another, for instance, suspecting it to be a piratical ship, may without guilt require it to lie to, but the moment the mistake is discovered all proceedings must cease. In the third place, the right of search must be exerted in such a way as to attain its object, and nothing more. Any injury done to the vessel or its cargo, any oppressive or insulting conduct during the search, may be good grounds for a suit in the court to which the cruiser is amenable, or even for interference on the part of the neutral State to which the vessel belongs.

The right of search in war time can be exercised in the territory of both belligerents or upon the high seas. But the right of search and visit can not be exercised in places where hostilities are forbidden, that is, within the territory of neutrals or within the territory of powers allied to the searching belligerent, without their consent.

The right of search can only be exercised by regular commissioned vessels provided with authority as such by the government of the State.

The usual method of summoning a vessel for the purpose of examination and search is by hoisting the national ensign and firing a blank charge which is known as the affirming gun. The neutral vessel may also be summoned by signals or by hailing through the speaking trumpet. It is the duty of the neutral vessel to obey such summons by heaving to, to allow boarding, at the same time displaying her national colors. The summons must be made in some form, otherwise there can be no blame attached to a neutral ship for not heaving to, and further steps in the way of firing a shotted gun can not be made unless the preliminary summons be disregarded. The distance of the boarding vessel should be a convenient one, and the old rule of cannon-shot distance can no longer be followed. Resistance to search made against a lawful cruiser subjects the vessel in time of war to confiscation. The resistance of the neutral vessel can not be justified or excused by any order from the sovereign power of the State, as international law does not permit a neutral State to interfere with the legal rights of the belligerent.

Convoy of neutral ships.—This brings us to the much-debated question whether neutral vessels convoyed by their own vessels of war have a right in war time to resist visitation and search. Most of the recent continental publicists maintain that neutral vessels under such circumstances are exempt from search. English writers, following the lead of Sir William Scott, maintain that the right to visit and search merchantmen is not affected by convoy, notwithstanding assurances on the part of the convoying men-of-war that the vessels of the convoy are free from fraudulent intent or taint of contraband.

The policy of the United States has been to favor the rule of exemption, and this principle has been introduced into thirteen of the treaties made with other States, the last being with Italy in 1871.

France has made similar conditions in six treaties, while Germany, Austria, Spain, and Italy, in addition to the Baltic powers, provide by their naval regulations that the declaration of a convoying officer shall be accepted. Great Britain stands alone. Many of our publicists hold views not unlike those of England, but in view of the policy of the United States as shown in its treaty stipulations and the concurrent view of almost all of the great powers it is most probable that our practice in future wars will conform to that enunciated in the Regulations of the Navy for 1876, which instruct officers in command of convoying ships not to permit ships under their protection to be searched

or detained by any belligerent or other cruiser, but to be satisfied also that no contraband is being carried to a belligerent port, and to be acquainted with all particulars as to the nationality and ownership of the vessels of the convoy.

The question whether neutral vessels who place themselves under the convoy of a belligerent cruiser are liable to capture and confiscation has also been much discussed. The lords of appeal in England decided that sailing under the convoy of an enemy was sufficient and conclusive grounds for condemnation. Mr. Wheaton maintained that though it might be considered presumptive evidence, it could not be regarded as conclusive evidence. The weight of opinion favors the doctrine that such acts are sufficient to condemn the vessel joining a belligerent convoy.

The right of a belligerent to visit and search neutral vessels carries with it the right to demand and examine the ship's papers. Chancellor Kent says on this point:

> A neutral is bound not only to submit to the search, but to have his vessel duly furnished with genuine documents requisite to support her neutral character. The most material of these documents are the register, passport or sea letter,[1] muster roll, log book, charter party, invoice, and bill of lading. The want of some of these papers is strong presumptive evidence against the ship's neutrality, yet the want of any one of them is not absolutely conclusive. * * *
>
> The concealment of papers material for the preservation of the neutral character justifies a capture and carrying it into port for adjudication, though it does not actually require a condemnation.

The destruction or spoliation of papers is a still more suspicious circumstance, and in most countries would be sufficient in itself to exclude further proof and condemn the vessel; but it does not in England create an absolute presumption *juris et de jure.* The Supreme Court of the United States has followed the English rule and held that spoliation of papers was a circumstance open to explanation.

False papers when intended expressly to deceive the belligerent by whom the capture is made, and which if accepted as genuine would clear the vessel from any taint, are sufficient cause for condemnation.

The following are the rules to be observed by the belligerent captor of the neutral:

(1) He must exercise his right of visit, search, and capture with as much regard for the persons and property of the neutral as the circumstances will allow. The former can not be treated as prisoners of war, though such persons as may be necessary as witnesses before the courts may be detained. No pledges or promises for the future can be exacted from them.

(2) The captured vessel must be sent in for adjudication as soon as possible. If improper delay occurs demurrage is allowed. The neutral property can only be transferred and condemned by proper courts and trial, so it is not proper to destroy it. If a neutral vessel can not be brought into port for adjudication it should be released.

(3) Due care should be exercised to preserve the vessel and its cargo from loss or damage. But loss by unavoidable perils of sea does not require compensation or penalty. Compensation is awarded in case of loss or injuries from a want of proper care or assistance on the part of the captor.

The right of search in time of peace as applied to piracy and the slave trade.—The right of approach.—The right of seizure beyond the 3-mile

[1] Not now required by vessels of the United States.

limit for a violation of municipal law, which has already been discussed, is, as Woolsey says,

> An incident of sovereignty in a state of peace, but is confined in its exercise to a small range of the sea. The right of search on suspicion of piracy, however, is a war right, and may be exercised by public vessels anywhere except in the waters of another State, because pirates are enemies of the human race, at war with all mankind.

Vessels suspected of piracy can, then, be detained in time of peace, but if detained with insufficient grounds there is a possibility of a claim for damages.

The State has no right to direct its public vessels to visit and search vessels of other States upon suspicion of being engaged in the slave trade without special treaty arrangements. The slave trade, not being piracy by the law of nations, but only by municipal and conventional law, the right of search is not conceded to foreign vessels.

The question of the search and visit of American vessels for the impressment of seamen can be considered as closed by Mr. Webster's communication to Lord Ashburton in 1842. In it he says:

> The American Government, then, is prepared to say that the practice of impressing seamen from American vessels can not be allowed to take place. That practice is founded on principles which it does not recognize and is invariably attended by consequences so unjust, so injurious, and of such formidable magnitude as can not be submitted to.

In the case of the *Mariana Flora* the Supreme Court of the United States declared that ships of war, properly commissioned, had the right to approach merchantmen or other vessels in time of peace upon the high seas for the purpose of observation.

This, however, has never been supposed to draw after it any right of visitation or search. The right of approach is for the sole purpose of ascertaining the real nationality of the vessel sailing under suspicious circumstances.

Secretary Cass, in his dispatch to Lord Lyons of date of May 12, 1859, stated that the United States Government concurred with those of Great Britain and France as to the propriety of an exhibition of her flag by every merchantman on the ocean whenever she meets a ship of war, either of her own or any foreign nation; that in reference to the friendly approach to a suspicious vessel no objection could exist, but those vessels so approached could not be bound to lie to or await the approach.

CHAPTER XII.

CAPTURE IN MARITIME WAR; PRIZE COURTS.

SECTION 67.—PROPOSED IMMUNITY OF ENEMY'S PROPERTY IN NEUTRAL VESSELS.

This is popularly known as the doctrine of "Free ships, free goods." Concerning this Dana says that the United States and Great Britain have long stood committed to the following points as in their opinion established in the law of nations:

(1) That a belligerent may take enemy's goods from neutral custody on the high seas; (2) that neutral goods are not subject to capture from the mere fact that they are on board an enemy's vessel; and (3) that the carrying of enemy's goods by a neutral is no offense, and consequently not only does not involve the neutral vessel in penalty, but entitles it to its freight from the captors as a condition to a right to interfere with it on the high seas. * * * While the Government of the United States has endeavored to introduce the rule of "free ships, free goods," by conventions, her courts have always decided that it is not the rule of war, and her diplomatists and her text writers—with singular concurrence, considering the opposite diplomatic policy of the country—have agreed to that position.

The Declaration of Paris changed the position of England upon this question. This declaration, signed April 16, 1856, consists of an agreement or declaration as to the following four articles, viz:

(1) Privateering is and remains abolished.
(2) The neutral flag covers enemy's goods, with the exception of contraband of war.
(3) Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.
(4) Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

At the outbreak of our civil war the United States made it known to the maritime powers of Europe that they were ready to adopt the second, third, and fourth articles of the declaration, and that, though they preferred them with the amendment proposed by Mr. Marcy exempting private property from capture at sea, and without the first article, they were willing to adopt them as they stood. Their offer was declined by Great Britain and France, who desired to make special restrictions and exceptions applying to the civil war and the Confederates.

Notwithstanding this, the United States made known their intention to follow the second, third, and fourth rules of the declaration during the civil war. As the Executive policy was likely to be at variance with the judicial precedents, it was thought that the latter would come in conflict with the tenets of the second article. The Executive has control of such matters, however, by instructions to the Navy as to the capture of neutral vessels, and also by ordering restitution if such capture should have occurred before adjudication is had. As a matter of fact, no case is reported to have happened of a condemnation in opposition of either the second or third articles of the Declaration of Paris during the civil war.

The policy of the United States in regard to the second article of the declaration and to the doctrine of free ships and free goods has been expressed since the civil war in several treaties, notably that made with Italy in 1871; and the doctrine may be considered a settled one so far as the action of the United States in the future may be concerned.

In England there has been some agitation looking toward the abrogation of the Declaration of Paris. Considering her immense commerce, which would be exposed to capture, it has been proposed by some English writers to adopt the rule of exemption of private property, or if this should not be done they would propose the abrogation of the second rule of the declaration, forbidding the capture of enemy's goods in neutral vessels.

There is an interesting question as to the working of the declaration of Paris in case of war between England and France. As neutral vessels may protect the goods of an enemy, will not the commerce of both countries be transferred to neutral flags? As to the transfer of the ships themselves to neutral flags the rules of the two countries differ; France treats such transfer made after the announcement of hostilities as invalid. England admits the principle of sale, provided it be *bona fide* and complete, but reserves the right of scrutinizing sharply every sale made to neutrals after the beginning of war. Obviously in case of war between the two countries the French rule would bear more hardly upon English ships than the English rule on French ships. Presumably, however, it would be open to the English courts to treat vessels as still French which in the eye of the French law were incapable of lawful sale to foreigners.

The attitude of these countries toward the United States in case of such a war would be uncertain. The Declaration of Paris is binding only upon and among the signatory powers, and it is possible that it may be held that the neutral American consequently can not carry belligerent goods. It is true that it has been stated by some of the signatory powers that it was a general doctrine of international law that was enunciated, not a simple treaty obligation; but a different action is permissible by the treaty, and was proposed by Chile during her war with Spain, a power not agreeing to the Declaration of Paris. France, on the contrary, in the war of 1870, declared in her naval instructions that the principles of the second and third articles were applicable to Spain and the United States, thus putting our vessels on a footing with other neutrals. If this action should not be repeated or become general toward us, our ships would be placed at a great disadvantage as neutral carriers.

It seems possible that in a war between two great naval powers there will be a strong tendency either to abrogate the second and third articles of the Declaration of Paris or to go further and exempt all private property from capture at sea except contraband of war.

SECTION 68.—NEUTRAL GOODS IN ENEMY'S SHIPS.

This question, plainly stated, is, whether the innocent goods of a neutral can be transported in a belligerent vessel without exposure to confiscation upon capture of the belligerent vessel. This question was much discussed until the adoption of the third article of the Declaration of Paris practically settled the question. This, as may be remembered, provides that neutral goods are not liable to capture afloat when under enemy's flag, with the exception always of contraband of war.

Chief Justice Marshall, in the case of the *Nereide*, delivered the opinion of the majority of the Supreme Court of the United States:

A neutral merchant has a right to charter and lade his goods on board a belligerent armed vessel without forfeiting his neutral character. * * * That a neutral may lawfully place his goods on board a belligerent vessel for conveyance on the ocean is universally recognized as the original law of nations.

In the words of Sir Travers Twiss:

This opinion is entitled to great weight, not merely from the authority which attaches to the opinion of that eminent judge, but also from the solidity of the reasoning upon which his judgment in that case proceeded.

Notwithstanding the opinion of Justice Story was the other way, the Supreme Court at a later date maintained the same opinion, in the case of the *Atlanta*, in the following definite words:

It is a principle of the law of nations that a neutral cargo found on board an armed enemy's vessel is not liable to condemnation as prize of war.

Notwithstanding the recognition of this doctrine as the rule of international law, some of the treaties that the United States have made upon this subject provide for the confiscation of neutral goods when carried by enemy vessels.

Concerning this, Mr. Pickering, when Secretary of State, wrote to Mr. Pinckney:[1]

It is true that sundry nations have in many instances introduced by their special treaties another principle between them, that enemy bottoms shall make enemy goods, and friendly bottoms friendly goods; but this is altogether the effect of particular treaties, controlling in special cases a general principle of the law of nations, and therefore taking effect between such nations only as have so agreed to control it.

The almost universal acceptance of the Declaration of Paris upon this point, and the coincident policy of the United States as well as its past readiness to accept the Declaration of Paris, practically establishes this usage and principle for the maritime world.

In 1872 the French prize court gave a decision as to neutral goods on board of two German ships which had been captured and destroyed in the war of 1870–71. It was decided that, though under the terms of the Declaration of Paris neutral goods on board an enemy's vessel can not be seized, it only follows that the neutral whose goods are so embarked can claim restitution of his merchandise, or, in case of its sale, the proceeds of its sale; but that an indemnity can not be claimed for any destruction or loss by acts of war which may accompany or follow its capture. Hall says:

It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy's ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might, under some circumstances, amount to an indirect repudiation of the Declaration of Paris. In the case, for example, of a State, the ships of which were largely engaged in carrying trade, a general order given by its enemy to destroy, instead of bringing in for condemnation, would amount to a prohibition addressed to neutrals to employ as carriers vessels, the right to use which was expressly conceded to them by the declaration in question. * * * It ought to be incumbent upon a captor who destroys such goods together with his enemy's vessel to prove to the satisfaction of the prize courts, and not merely to allege, that he has acted under the pressure of a real military necessity.

SECTION 69.—PRIZE COURTS.

The courts of the United States which take cognizance of maritime capture are the District Courts, the Circuit Courts, and the Supreme Court.

The District Courts have exclusive original cognizance of all civil causes of admiralty, and maintain jurisdiction within certain limitations as to the tonnage of the vessels. They have also jurisdiction

[1] American State Papers, I, 559.

concurrently with the Circuit and State Courts of causes where an alien sues for an injury suffered in violation of international law or a treaty of the United States.

They possess all the powers of a prize court and have cognizance of complaints by whomsoever instituted in cases of captures made within the United States.

In prize cases appeals from the final decrees of the District Court may be carried direct to the Supreme Court of the United States. On the other hand, appeals in admiralty cases go to the Circuit Court of appeals, whose judgment is final.[1]

The prize courts of the other powers vary in jurisdiction and constitution. No civilized State which has a commercial or an armed navy is without such court. There are different methods of procedure in the various States, but the general principles of law, and the rules as to evidence, etc., are as a general rule very much the same.

The rules of international law recognized by the authorities of the United States are those admitted by common custom at the period when the United States became independent, except when modified by treaty. And the practice of our prize courts, which are the real expounders of the law, conforms to that of the British courts, except when modified by treaty.

The Supreme Court of the United States declared, in the decision of the cases growing out of the war of 1812, that as the United States was at one time a component part of the British Empire, the prize law of that country was, as understood at the time of the separation from the mother country, the prize law of the United States. But the rules later adopted by England are entitled to no more authority in our courts than those of other countries.[2] Lawrence says:

> The constitution of prize courts is an anomaly in jurisprudence. Deriving their authority from one nation, they pass irrevocably on the property belonging to the citizens or subjects of another. Tribunals exclusively of the belligerents, they pronounce on the rights of neutrals, who have no other appeal from the admiralty courts in the last resort than to the justice of the sovereign of the captor, through the diplomatic interposition of their own government.

Responsibility of captors.—By the law of nations there is an established method for determining whether the capture be or be not a legal prize. Capture alone does not transfer any right of property in the vessel or cargo to the captors; the title remains unchanged until a regular sentence of condemnation is given by some competent prize court after a regular trial wherein both parties can be heard.

The competent and proper prize court for such condemnation is a court of that State to which the captor belongs.

If the captured vessel or any part of her cargo is not in fit condition to be sent in for adjudication the laws of the United States provide for an appraisement and sale, and deposit of the proceeds to the order of the prize court in which proceedings are to take place.

In case any captured vessel or property is taken for the use of the United States before it comes into the custody of a prize court it must be surveyed, appraised, and inventoried, and the results sent to the prize court in which proceedings are to take place, and the department of the government for whose use it has been appropriated must deposit the value thereof subject to the order of the court in the cause. The British Government objected to this law during our civil war.

Dana says:

> Necessity will excuse the captor from the duty of sending in his prize. If the prize is unseaworthy for a voyage to the proper port, or there is impending danger

[1] Act of March 3, 1891. [2] Dahlgren, p. 85.

of immediate recapture from an enemy's vessel in sight, or if an infectious disease is on board, or other cause of a controlling character, the law of nations authorizes a destruction or abandonment of the prize, but requires all possible preservation of evidence in the way of papers and persons on board. And even if nothing of pecuniary value is saved it is the right and duty of the captor to proceed for adjudication in such a case, for his own protection and that of his government and for the satisfaction of neutrals. In the case of the *Trent*, the reason assigned by Captain Wilkes for not sending in his prize was the great inconvenience that would result to the numerous passengers on board and to the commercial world, as there were mails on board for all parts of Europe which would have to be subjected to delay. This motive, though creditable to the commander in that case, is not recognized by the law of nations as an excuse.

If damage happens to the vessel or cargo while in the hands of the captors, and the court holds the capture to have been made on probable grounds, the responsibility of the captor is only for a failure to use reasonable care and skill.

APPENDIX 1.

DOCUMENTS AND PAPERS CARRIED BY VESSELS OF THE UNITED STATES.

Evidence of nationality:

- Permanent register for vessels engaged in foreign trade. (Granted by collectors to vessels of their districts.)
- Temporary register for vessels engaged in foreign trade. (Granted by collectors to vessels not of their districts.) (*See* Forms (Catalogue No. 534), p. 10, Customs Regulations.)
- Permanent enrollment for vessels engaged in coasting trade. (Granted as above.)
- Temporary enrollment for vessels engaged in coasting trade. (Granted as above.) (*See* Forms (Catalogue No. 538), p. 15, Customs Regulations.)
- Permanent license for vessels engaged in fisheries. (Granted as above.)
- Temporary license for vessels engaged in fisheries. (Granted as above.)
- Licenses to yachts.
- Commissions to licensed yachts for cruising abroad.

Other papers that may be used as evidence of nationality:

- Shipping articles.
- Crew list. (*See* Customs Regulations, p. 68.)

Evidence of nationality of foreign-built vessels owned by citizens of the United States entitled to carry the flag and to legal protection, but not documented vessels of the United States:

- Certificate of ownership, and also as to the validity and filing of the bill of sale. (Issued by the collector of port or United States consul.)

Other papers carried:

- Permit for fishing vessel to touch or trade at a foreign place. (*See* Customs Regulations, p. 75.)
- Passenger list.
- Manifest of cargo, foreign or coasting. (*See* Customs Regulations, pp. 53, 66, 73.)
- Clearance. (*See* Customs Regulations, pp. 70, 74.)
- Bills of lading.
- Ship's log book.
- Bill of health.

Commercial intercourse with the guano islands under the jurisdiction of the United States is a part of the coasting trade. Vessels engaged in this guano trade are not required to produce clearances or certified manifests.

The tonnage of a vessel, besides being shown upon her certificate of registry, etc., is marked upon the face of the beam under the forward side of the main hatch of seagoing vessels.

APPENDIX 2.

OFFICE OF THE COLLECTOR OF CUSTOMS,
Port of New York, August 24, 1894.

To ——— ———,

United States Naval War College, Newport, R. I.

SIR: Replying to your letter of the 20th instant, relating to the yacht *Valiant*, I have to state that said yacht has not, and is not entitled to, a license under the law. She is, however, entitled to, and has, under sections 4190 and 4226, a certification that the vessel is owned by an American citizen.

This certification Judge Benedict held, in the case of the *Miranda* (47 Fed. Rep., 816), is such a document as proves American property and relieves the vessel of paying light money, within the contemplation of section 4225 Revised Statutes. See also case of the *Conqueror* (49 Fed. Rep., 295), on the question of customs duty on foreign-built yacht.

Foreign-built yachts owned by citizens of the United States, in the absence of the certification above referred to, and not enrolled in a regularly organized yacht club of a foreign nation which extends like privileges to yachts of the United States, are subject to light money dues under section 4225, above quoted. They can not import or engage in trade between a foreign place and this country. Such yachts have no nationality. They may fly the American flag as an indication of ownership and for the due protection of property of an American citizen. (*See* Treasury Department decision of March 17, 1873, as to privilege of carrying the American flag.)

For reply to concluding portion of your letter asking whether the laws and decisions that apply to foreign-built merchant vessels owned by citizens of the United States also apply to foreign-built yachts when owned by such citizens, I can only say in brief that as a general rule the laws applicable to such merchant vessels do apply to such yachts.

It must be observed that in the case of certain descriptions of yachts there are special and exceptional provisions, as in sections 4216 and 4226, exempting them under certain conditions from entering or clearing at the custom-house, also from tonnage tax and light money.

Respectfully yours,

JAMES H. KILBRETH, *Collector.*

APPENDIX 3.

PAPERS CARRIED BY VESSELS IN EVIDENCE OF THEIR NATIONALITY, AND OTHER PAPERS WHICH OUGHT TO BE FOUND ON BOARD.

[From Hall's International Law, p. 753, 3d ed.]

AUSTRIA.

Papers evidencing nationality:
- Patente sovrana (royal license).
- Scontrino ministeriale (certificate of registry).

Other papers carried:
- Giornale di navigazione (official log-book).
- Scartafaccio, giornale di navigazione cotidiano (ship's log-book).
- Ruolo dell' equipaggio (muster-roll).
- Manifest of cargo and bills of lading.
- Charter-party, if the vessel is chartered

BELGIUM.

- Lettre de mer (sea-letter).
- Rôle d'équipages.
- Régistre de certificat de jaugeage (certificate of registry).
- Log-book.
- Manifest of cargo.
- Les connaissements (bills of lading).
- Act de propriété.
- Charter-party.

BRAZIL.

Papers evidencing nationality:

Carta de registro (certificate of registry).

Passe especial (special pass) issued to Brazilians out of the Republic by the minister or consul in the foreign country and constituting provisional proof of nationality.

Other papers carried:

Passport.

Muster-roll.

Manifest of cargo.

Bills of lading.

DENMARK.

Papers evidencing nationality:

Registrering certifikat (certificate of nationality and registry).

Provisional certificate of registry issued by governors of possessions abroad or by consuls.

[The letters D. E. (Dansk Eiendom) burnt into the main beam in the after part of the main hatchway.]

Papers carried other than that above mentioned:

Royal passport, in Latin, with translation, available only for the voyage for which it is issued, unless renewed by attestation.

Certificate of ownership.

Build-brief (certificate of build).

Admeasurement-brief.

Burgher-brief (certificate that the master has burgher rights in some town of the kingdom).

Muster-roll.

Charter-party, if the vessel is chartered.

FRANCE.

Papers evidencing nationality:

L'acte de francisation (certificate of nationality).

Acte de francisation provisoire.

Other papers which must be carried under the provisions of the Code de Commerce:

Congé (sailing license).

Le rôle d'équipage.

L'acte de propriété de navire.

Les connaissements et chartes-parties.

Les procès-verbaux de visite.

Les acquits de paiement ou à caution.

Manifest of cargo and inventory of ship's fitting and stores.

GERMANY.

Papers evidencing nationality:

Schiffs Certifikat (certificate of nationality).

Flaggen Attest (provisional certificate of nationality).

Other papers carried:

Messbrief (certificate of measurement).

Beilbrief (builder's certificate).

See-pass (sailing license).

Journal (ship's log-book).

Musterrolle (muster-roll).

Charter-party, if the vessel is chartered.

GREAT BRITAIN.

Paper evidencing nationality:

Certificate of registry, or provisional certificate granted by a consul resident in a foreign country to a vessel brought there. The provisional certificate is good for six months from the date of issue. A pass granted to a vessel before registration, enabling her to go from one British port to another within the British dominions, has also the force of a certificate.

Other papers carried:

Official log-book.
Ship's log-book.
Shipping articles.
Muster-roll.
Manifest of cargo.
Bills of lading.
Charter-party, if the vessel is chartered.

GREECE.

Paper evidencing nationality:

Certificate of nationality.

Other papers carried:

Congé or passport.
Inventory of ship's fittings.
Certificate of tonnage.
Muster-roll.
Description of visits to which the ship has been subjected.
Log-book.
Bill of health.

ITALY.

Paper evidencing nationality:

Alto di nazionalità (certificate of nationality).

Other papers carried:

Giornale di navigazione (official log-book).
Scartafaccio, giornale di navigazione cotidiano (ship's log-book).
Ruolo dell' equipaggio (muster-roll).
Manifest of cargo and bills of lading.
Charter-party, if the vessel is chartered.

NETHERLANDS.

Zeebrief (sailing license).
Voorloopige Zeebrief (provisional sailing license).
Buitengevone Zeebrief (extraordinary sailing license).
Bijlbrief (certificate of ownership).
Meetbrief (certificate of tonnage).
Journal (ship's log-book).
Monster-rol (muster-roll).
Manifest of cargo and bills of lading.
Charter-party, if the vessel is chartered.

NORWAY.

Paper evidencing nationality:

Nationalitetsbreviis (certificate of nationality).
Provisional certificate granted by consul.

Other papers carried:

Bülbrev (certificate of build).
Maalebrev (certificate of measurement). The bülbrev and the maalebrev need not be carried by vessels bought in foreign ports for two years after purchase.

Mandskabliste (muster-roll).
Journale (ship's log-book).
Manifest of cargo and bills of lading.
Charter-party, if the vessel is chartered.

PORTUGAL.

Papers with which a vessel must be provided:
Pasaporte de navigacion.
Acta de propriedad del buque.
Rol.
Conocimientos.
Recibos de fletes y despacho.
A copy of the Code of Commerce.

RUSSIA.

Evidence of nationality:
Patent authorizing the use of the Russian flag.
The fact that the master and half the crew are Russian. The patent is not conclusive in itself, because it can be granted, though it is not commonly granted, to foreign ships.
Papers which must be carried by Russian ships:
The patent above mentioned.
Beilbrief (builder's certificate),
Custom-house passport.
Other papers carried:
Ship's log-book.
Muster-roll.
Charter-party, if the vessel is chartered.

SPAIN.

Paper evidencing nationality:
La patente ó pasaporte de navigacion.
Other papers carried:
El rol del equipage y lista de pasajeros.
Testimonio de la escritura de propiedad de la nave.
Contrato de fletamento.
Conocimientos, facturas y guias de la carga.

SWEDEN.

A passport from a chief magistrate or commissioner of customs.
Bilbrief (builder's certificate).
Mätebref (certificate of measurement).
Fribref (certificate of registry).
Journalen (ship's log-book).
Folkpass or sjömansrubla (muster-roll).
Charter-party, if the vessel is chartered.

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